

(21,106 and 21,107.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 342.

THE BALTIMORE AND OHIO SOUTHWESTERN RAIL-
ROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

No. 343.

THE BALTIMORE AND OHIO SOUTHWESTERN RAIL-
ROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SIXTH CIRCUIT.

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1 UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

At a stated term of the United States Circuit Court of Appeals for the Sixth Circuit, begun and held in the Court Rooms at the city of Cincinnati, Ohio, in the said Circuit, on the first Tuesday of October, 1907, among the proceedings had were the following, to-wit:

On the 4th day of November, 1907, came the District Attorney on behalf of the United States of America, plaintiff in error herein, and filed a transcript of the record of the District Court of the United States for the Western Division of the Southern District of Ohio, wherein the United States of America was plaintiff and the Baltimore & Ohio Southwestern Railroad Company was defendant, which said transcript of record is clothed in the words and figures following, to-wit:

2 *Transcript of Record.*

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

At a stated term of the District Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and held in the court rooms at the city of Cincinnati, Ohio, in said District, on the first Tuesday of October, it being also the first day of that month, in the year of our Lord one thousand nine hundred and seven, and the one hundred and thirty-second year of the Independence of the United States of America.

Present: The Honorable Albert C. Thompson, District Judge.

Among the proceedings had, were the following, to-wit:

No. 1863. At Law.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTH WESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, that heretofore, to-wit, on the twenty-second day of March in the year of our Lord one thousand, nine hundred and seven, came the District Attorney on behalf of the United States of America, the plaintiff herein, and filed its certain petition in this cause against the defendant herein, which said petition is clothed in the words and figures following, to-wit:

Petition.

District Court of the United States, Southern District of Ohio,
Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTH WESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that the Baltimore & Ohio South-western Railroad

Company is a corporation organized under the laws of the
3 States of Ohio and Indiana; that its railroad extends through the states of Illinois, Indiana and Ohio, and said road forms part of and is a line of road over which cattle, sheep, swine or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the city of Cincinnati, and State of Ohio;

That on February 2d, 1907, one, J. A. Brooke, of Louisville, Illinois, shipped over the road of the said the Baltimore & Ohio Southwestern Railroad Company to Snowden, Seal & Richey, of Cincinnati, Ohio, a partnership, live stock consisting of fifty-three (53) hogs, thirty-six (36) cattle, and four (4) calves, contained in B. & O. cars Nos. 12741 and 11,868; that the loading of the live stock, aforesaid, was done and completed at Louisville, Illinois, on February 2d, 1907, at three-thirty o'clock (3:30) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven fifteen o'clock (11:15) A. M., on February 4, 1907; the entire time en route from the place of shipment to destination, aforesaid, being forty-three (43) hours and forty-five (45) minutes;

That the said, the Baltimore & Ohio Southwestern Railroad Company was given written request by the owner and person accompanying said shipment of live stock, above described, to extend the time of confinement of said live stock to thirty-six (36) hours; and that the said defendant thereupon had the right to extend the time of confinement of said live stock to thirty-six (36) hours.

Affiant further says that the said live stock, above described, was continuously confined in the cars above designated, namely, B. & O. cars Nos. 12,741 and 11,868, for a period longer than thirty-six (36) hours, without rest, water, or food, by the said defendant, the Baltimore & Ohio Southwestern Railroad Company; and that the said live stock was continuously confined within the said cars for a period of more than forty-three (43) hours without being unloaded for rest, water and feeding, or either; and that said defendant knowingly and wilfully failed to unload the said live stock in a

humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the violation of the said Act of Congress, of June 29, 1906, in failing to unload the
4 live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, the United States of America, prays for judgment against the defendant, the Baltimore & Ohio South-western Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me and subscribed in my presence, this 22d day of March, 1907.

[SEAL.]

EDW. MOULINIER,
Notary Public in and for Hamilton County, Ohio.

And afterwards, to-wit, but on the same day, the following Præcipe for Summons was filed in the clerk's office of the court aforesaid, which said Præcipe for Summons is clothed in the words and figures following, to-wit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division:*

No. 1866.

UNITED STATES

vs.

B. & O. S. W. R. R. Co.

United States District Court.

To Benjamin R. Cowen, Clerk of said court:

Please issue summons for above named defendant returnable according to law, amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

And afterwards, to-wit, but on the same day, there was issued out of the clerk's office of the court aforesaid, our certain summons, directed to the Marshal of said District, and against the defendant herein, which said summons is clothed in the words and figures, following, to-wit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

5 You are commanded to notify the Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by the United States of America, Plaintiff in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answers by the 20th day of April, A. D. 1907, the petition of the said Plaintiff the United States of America against it filed in the clerk's office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22d day of March, A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:

[SEAL.]

B. R. COWEN, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

Summons endorsed: Summons in action for money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to-wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the foregoing Summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings endorsed thereon, which said proceedings are clothed in the words and figures following, to-wit:

Marshal's Return of Summons.

Received this Writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this district.

EUGENE L. LEWIS, *Marshal*,
By E. E. McGUIRE, *Deputy*.

Total Fees, \$2.42.

And afterwards, to-wit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of said Court, which said entry is clothed in the words and figures following, to-wit:

Entry—Journal 9, Page 354.

Defendant Given Twenty Days Further Time Within Which to Plead.

6 Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, to-wit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's office of the Court aforesaid, which said Answer is clothed in the words and figures following, to-wit:

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1886.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one J. A. Brooks, of Louisville, Illinois, and was consigned to Snowden, Seal & Richey, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to-wit:

One shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is

alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

7 And also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

8 Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been

brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on docket of this Court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

9

HARMON, COLSTON, GOLDSMITH
& HOADLEY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn says he is Assistant General Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA H. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, to-wit, on the 7th day of May A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures, following, to-wit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number-1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLEY,

Attorneys for Defendant.

And afterwards, to-wit on the 8th day of May, A. D. 1907, the following Motion for judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, to-wit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY (a
Corporation), Defendant.

Motion.

10 Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding

the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. McPHERSON,
United States Attorney for the Southern District of Ohio.

And afterwards, to-wit, on the 23rd day of September, A. D. 1907, the following Motion for a Separate Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures, following, to-wit:

Motion for a Separate Judgment.

the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

—
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the plaintiff, the United States of America by Sherman McPherson, United States Attorney for the Southern District of Ohio, and moves the court for a separate judgment in this cause and each of the several causes, being Nos. 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, and 1880 on the docket of this court, consolidated with it for the reason that each of said causes should be treated as a different cause of action, and a separate penalty assessed on each.

SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

And afterwards, to-wit, on the 19th day of October, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 415.

Motion of Plaintiff for Separate Judgment.

Overruled.

This day this cause coming on to be heard upon the motion of the plaintiff for separate judgment in each cause consolidated herewith, being causes numbers 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, and 1880 and 1884 on the docket of this court, for the reason that each of said causes should be treated as a different cause of

action; the court being fully advised in the premises, doth overrule said motion, to which ruling of the court, the plaintiff, the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

11 And afterwards, to-wit, on the 28th day of October, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 419.

This day this cause coming on to be heard upon the petition, the answer, and other papers filed herein, and it being argued by Counsel; the Court, being fully advised in the premises, finds that the defendant herein admits its liability in this cause, and therefore doth hereby order and adjudge that said defendant pay to the plaintiff herein the sum of one hundred dollars and its costs herein expended, and in default of payment execution shall issue, and the Court does order, adjudge and decree that the within foregoing order in cause number 1866, shall apply to, operate upon, and be conclusive of the right of the plaintiff to recover of the defendant in each of the following causes, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884, and the United States of America, by Sherman T. McPherson, United States Attorney, does except to the order of the Court making the order and judgment in cause No. 1866 apply to each of the following cause-, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884.

And afterwards, to-wit, on the 30th day of October, A. D. 1907, the following Petition in Error was filed in the Clerk's Office of the Court aforesaid, which said Petition in Error is clothed in the words and figures, following, to-wit:

Petition in Error.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition in Error.

Now comes the United States of America, plaintiff herein, and says that on or about the twenty-eighth day of October, 1907, this court entered a judgment here in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior

thereto in this cause, and certain other causes consolidated herewith by order of the court, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

12 Wherefore, the United States of America, plaintiff herein, prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the Circuit Court of Appeals.

SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

And afterwards, to-wit, but on the same day, the following Assignment of Errors was filed in the Clerk's Office of the Court aforesaid, which Assignment of Errors is clothed in the words and figures following, to-wit:

Assignment of Errors.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers were committed upon the trial of this cause, and the causes consolidated herewith by order of Court, to-wit:

1. The court erred in overruling the motion of the plaintiff for judgment notwithstanding the answer filed by defendant in causes numbers 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884, on the docket of this court.

2. The court erred in consolidating causes numbers 1867, 1868, 1869, 1870, 1871, 1872, 1874, 1880 and 1884 with this cause.

3. The court erred in overruling the motion of the plaintiff for separate judgment in each cause consolidated with cause number 1866, being causes numbers 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884, for the reason that each of said causes, after consolidation should have been treated and considered as a separate and distinct cause of action, and a separate penalty assessed in each cause.

4. The court erred in refusing to render separate judgment in causes numbers 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874,

1880 and 1884, on the docket of this court for the reason that each of said causes of action were separate and distinct from this cause of action, to-wit, cause number 1866.

5. The court erred in ordering that the fine and judgment in cause number 1866 shall be conclusive of the right of the plaintiff to recover from the defendant in each of the following causes, to-wit, numbers 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884, each of which was, by order of court consolidated with cause number 1866.

For these reasons the plaintiff the United States of America, asks that this case be reviewed, and that such judgment be rendered in the United States Circuit Court of Appeals as should have been rendered in the Court below, or that such action be taken as will protect the rights of the plaintiff in the premises.

SHERMAN T. McPIHERSON,
United States Attorney, S. D. O.

And afterwards, to-wit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 420.

Writ of Error Ordered.

Now comes the United States Attorney on behalf of the plaintiff and presents for allowance his petition for writ of error and assignment of errors accompanying same, upon condition of which the court hereby allows said petition and orders a writ of error to the United States.

And afterwards, to-wit, on the 30th day of October, A. D. 1907, the following Præcipe for Transcript was filed in the Clerk's Office of the Court aforesaid, which said Præcipe is clothed in the words and figures following, to-wit:

Præcipe for Transcript.

SOUTHERN DISTRICT OF OHIO:

No. 1866.

THE UNITED STATES OF AMERICA
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

United States District Court.

To Benjamin R. Cowen, Clerk of said court:

Please prepare a Transcript of the Docket Journal Entries in the above entitled cause to be filed in the Circuit Court of Appeals for the Sixth Circuit.

SHERMAN T. McPHERSON,
Attorney for United States of America.

Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

14 I Benjamin R. Cowen, Clerk of the District Court of the United States of America, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said Court in the above entitled cause, as the same appears of record and on file in the Clerk's Office of said Court.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 4th day of November, A. D. 1907.

B. R. COWEN, *Clerk,*
By B. E. DILLEY,
Deputy Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America, Plaintiff, and the Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, a manifest error hath happened, to the great damage of the said the United States of America, as by its complaint appears. We being willing that error, if any hath been, should be

duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 29th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second.

[SEAL.]

B. R. COWEN,

Clerk of the Dist. Court of the United States.

Allowed by

15 Hon. Albert C. Thompson, United States District Judge.

*Not exceeding 30 days from the day of signing the citation.

No. 1866. United States District Court, Southern District of Ohio, Western Division. The United States of America, vs. The Baltimore & Ohio Southwestern Railroad Company. Writ of Error. Filed Oct. 30, 1907, B. R. Cowen, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To the Baltimore & Ohio Southwestern Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit, to be holden at the City of Cincinnati, in said Circuit, on the* 29th day of November next, pursuant to a Writ of Error, filed in the Clerk's office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein the United States of America, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second.

A. C. THOMPSON, *Judge.*

*Not exceeding 30 days from the day of signing.

STATE OF OHIO, *County of Hamilton, ss:*

On this 4th day of Nov., A. D. 1907, personally appeared before me, a Notary Public in and for said County, and made oath that he delivered a copy of within citation to

Sworn to and subscribed before me — 189—

Nov. 4, 1907.—Issue of summons in error is hereby waived.

HARMON, COLSTON, GOLDWAITE
& HANDBY.

No. 1866. United States District Court, Southern District of Ohio, Western Division. The United States of America *vs.* The Baltimore & Ohio Southwestern Railroad Company. Citation. Filed Nov. 4, 1907. B. R. Cowen, Clerk.

16 United States Circuit Court of Appeals, Sixth Circuit.

And afterwards, on the same day, to-wit: the 4th day of November, A. D. 1907, was filed the following transcript of record of the District Court of the United States for the Western Division of the Southern District of Ohio, which said transcript is clothed in the words and figures following, to-wit:

(J. R.)

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

At a stated term of the District Court of the United States of America, within and for the Western Division of the Southern District of Ohio, in the Sixth Judicial Circuit of the United States of America, begun and held in the Court Rooms at the city of Cincinnati, Ohio, in said District, on the first Tuesday of October, it being also the First day of that month, in the year of our Lord one thousand nine hundred and seven, and the One Hundred and Thirty-second year of the Independence of the United States of America.

Present: The Honorable Albert C. Thompson, District Judge.

Among the proceedings had, were the following, to-wit:

No. 1867. At Law.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & SOUTHWESTERN RAILROAD COMPANY, Defendant.

Be it remembered, that heretofore, to-wit, on the Twenty-second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the District Attorney on behalf of the United States of America, the Plaintiff herein, and filed its certain Petition in this cause against the Defendant herein, which said Petition is clothed in the words and figures following, to wit:

Petition.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & SOUTHWESTERN RAILROAD COMPANY, Defendant.

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Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that the Baltimore & Ohio South-western Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the states of Illinois, Indiana and Ohio, and said road forms part of and is a line of road over which cattle, sheep, swine or other animals are conveyed from one State of the United States into or through another state of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, one, Shan Chapman, of Ridgeway, Illinois, shipped over the road of the said, The Baltimore & South-western Railroad Company to Jennings, McDonald & Co., of Cincinnati, Ohio, live stock consisting of thirty (30) cattle and one (1) calf, contained in B. & O. car No. 11969; that the loading of the live stock, aforesaid, was done and completed at Ridgeway, Illinois, on February 2nd, 1907, at one-forty-five o'clock (1:45) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-ten o'clock (11:10) A. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being forty-five (45) hours and twenty-five (25) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the car, above designated, namely, B. & O. car No. 11969, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio South-western Railroad Company; and that said live stock was continuously confined within the said car for a period of more than forty-five (45) hours without being unloaded for rest, water, and feedings, or either; and that said defendant knowingly and wilfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food,

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water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio South-western Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,

U. S. Atty S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me and subscribed in my presence this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,

Notary Public in and for Hamilton County, Ohio.

And afterwards, to wit, but on the same day, the following *Præcipe* for Summons was filed in the Clerk's Office of the Court aforesaid, which said *Præcipe* for Summons is clothed in the words and figures following, to-wit:

Præcipe for Summons.

Southern District of Ohio, Western Division.

No. 1867.

UNITED STATES

vs.

B. & O. S. W. R. R. Co.

United States District Court.

To Benjamin R. Cowen, Clerk of said Court:

Please issue Summons for above named defendant returnable according to law, amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,

Attorney for U. S.

And afterwards, to-wit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain Summons, directed to the Marshal of said District, and against the defendant herein, which said Summons is clothed in the words and figures, following, to-wit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

19 The President of the United States of America to the Marshal
 of the Southern District of Ohio, Greeting:

You are commanded to notify the Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said Plaintiff, The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:
 [SEAL.]

B. R. COWEN, *Clerk,*
 By C. P. WHITE, JR., *Deputy.*

Summons endorsed: Summons in action for money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to-wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the foregoing summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings endorsed thereon, which said proceedings are clothed in the words and figures following, to-wit:

Marshal's Return of Summons.

Received this Writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this district.

Total fees, \$2.30.

EUGENE L. LEWIS, *Marshal,*
 By E. E. McGUIRE, *Deputy.*

20 And afterwards, to-wit, on the 19th day of April, A. D.
 1907, an entry was made upon the Journal of said Court,
 which said entry is clothed in the words and figures following,
 to-wit:

.Entry Journal 9, Page 354.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, to-wit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, to-wit:

Answer.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & — SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes The Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defence it says that the shipment set out in the petition in this case was made by one Sam Chapman of Ridgeway, Illinois, and was consigned to Jennings, McDonald & Co., of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to-wit:

One shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss and Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kemmer, of Louisville Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket on this court 1872.

22 Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is

alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the

23 said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamlin County*, ss:

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3d day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, to-wit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the clerk's office of the court aforesaid, which said Motion is clothed in the words and figures following, to-wit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number 1866, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, to-wit, on the 8th day of May, A. D. 1907, the following Motion for Judgment was filed in the clerk's office of the court aforesaid, which said Motion is clothed in the words and figures following, to-wit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1867.

24 THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
(a Corporation), Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, to-wit, on the 24th day of August, A. D. 1907, the following Memorandum of Judge Thompson was filed in the clerk's office of the court aforesaid, which said Memorandum is clothed in the words and figures following to-wit:

Memorandum of Judge Thompson.

In the United States District Court, Southern District of Ohio, Western Division.

No. 1867.

THE UNITED STATES OF AMERICA,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

Mem.

This is an action brought by the United States under Section 4, of the Act of Congress of June 29, 1906, entitled, "An Act to prevent cruelty to animals while in transit by railroad," etc.

The petition alleges that Shan Chapman of Ridgeway, Illinois, shipped over the road of the defendant to Jennings, McDonald & Company, of Cincinnati, Ohio, live stock, "consisting of thirty cattle and one calf," contained in the defendant's car No. 11,909. That the loading of the live stock aforesaid was done and completed at Ridgeway, Illinois, on February 2, 1907, at 1:45 P. M., and that the unloading of said live stock at Cincinnati, Ohio, was not begun until 11:10 A. M., on February 4, 1907, the entire time en route from place of shipment to place of destination being forty-five hours and twenty-five minutes.

It further alleges that these animals were continuously confined in the car for a period longer than twenty-eight hours without rest, water or food, and prays judgment against the defendant in the sum of five hundred dollars.

25 The defendant answers, admitting the allegation of the petition, but alleges that eleven other shipments of animals by ten other shippers, from seven different places in Illinois, to three different consignees in Cincinnati, Ohio, were carried by the same train and that suit has been brought by the United States in this court against the defendant to recover separate penalties for each of these shipments, and moves the court to consolidate this cause with said other causes, in order that there may be a recovery of but one penalty for all the shipments.

The statute provides:

"SEC. 1. That no railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, in properly equipped pens for

rest, water, and feeding, for a period of at least five consecutive hours.

"SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having custody thereof, or in case of default in so doing, then by the railroad * * * at the reasonable expense of the owner or person in custody thereof."

Here the train carried distinct shipments and the railroad company was necessarily compelled to deal with them as such in every respect but one, namely, the unloading of the animals for rest, feed and water. The company could not, without violating the law, unload some of the shipments to the exclusion of the others, nor extend the time of confinement of some of them without the written consent of all. The law requires the railroad company to stop its trains carrying animals, once in every twenty-eight hours and unload the animals for rest, food and water, and imposes a penalty for the failure to do so. It deals with the operation of these trains, not with the different shipments which the trains may carry.

The motion will be sustained.

And afterwards, to-wit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 385.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, the United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court being duly advised in the premises, overrules
26 said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, to-wit, but on the same day, an entry was made upon the Journal of the court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 388.

Cause Consolidated With Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866 in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

And afterwards, to-wit, on the 30th day of October, A. D. 1907, the following Petition in Error was filed in the Clerk's office of the court aforesaid, which said Petition in Error is clothed in the words and figures, following, to-wit:

Petition in Error.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition in Error.

Now comes the United States of America, plaintiff herein, and says that on or about the twenty-eighth day of October, 1907, this court entered a judgment here in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, the United States of America, plaintiff herein, prays that a writ of error may issue in its behalf to the United States Circuit Court of Appeals for the Sixth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the Circuit Court of Appeals.

SHERMAN T. McPHERSON,

United States Attorney, S. D. O.

27 And afterwards, to-wit, but on the same day, the following Assignment of Errors was filed in the clerk's office of the court aforesaid, which said Assignment of Errors is clothed in the words and figures following, to-wit:

Assignment of Errors.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with its petition for a writ of error, makes the following assignment of errors, which it avers were committed upon the trial of this cause, to-wit:

1. The court erred in overruling the motion of the plaintiff for judgment notwithstanding the answer filed by defendant in this cause.

2. The court erred in sustaining the motion of the defendant to consolidate this cause with cause numbered 1866 on the docket of this court, to which action plaintiff at the time duly excepted.

3. The court erred in refusing to render judgment in this case after same had been consolidated with cause number 1866, to which action of the court plaintiff duly excepted.

4. The court erred in ordering the fine and judgment rendered in cause number 1866 to be conclusive of the right of the plaintiff to recover from the defendant in this cause, to-wit, number 1867, to which the plaintiff at the time excepted.

5. The court erred in failing to render judgment in cause numbered 1867.

For these reasons the plaintiff, the United States of America, asks that this case be reviewed, and that such judgment be rendered in the United States Circuit Court of Appeals as should have been rendered in the court below, or that such action be taken as will protect the rights of the plaintiff in the premises.

SHERMAN T. McPHERSON,

United States Attorney, S. D. O.

And afterwards, to-wit, but on the same day an entry was made upon the Journal of said court, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 420.

Writ of Error Ordered.

Now comes the United States Attorney on behalf of the plaintiff and presents for allowance his petition for writ of error and assignment of error accompanying same, upon con-

sideration of which the court hereby allows said petition and orders a writ of error to the United States Circuit Court of Appeals for the Sixth Circuit.

And afterwards, to-wit, on the 30th day of October, A. D. 1907, the following *Præcipe* for Transcript was filed in the clerk's office of the court aforesaid, which said *Præcipe* is clothed in the words and figures following, to-wit:

Præcipe for Transcript.

SOUTHERN DISTRICT OF OHIO:

No. 1867.

THE UNITED STATES OF AMERICA
vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

United States District Court.

To Benjamin R. Cowen, Clerk of said Court:

Please prepare a transcript of the Docket and Journal Entries in the above entitled cause to be filed in the Circuit Court of Appeals for the Sixth Circuit.

SHERMAN T. McPHERSON,
Attorney for United States of America.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, Benjamin R. Cowen, Clerk of the District Court of the United States of America, within and for the District and Division aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings had by and before said court in the above entitled cause, as the same appears of record and on file in the Clerk's Office of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at the city of Cincinnati, Ohio, this 4th day of November, A. D. 1907.

[SEAL.]

B. R. COWEN, *Clerk*,
By B. E. DILLEY,
Deputy Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

The President of the United States to the Honorable, the Judge of the District Court of the United States for the Southern District of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The United States of America, Plaintiff, and The Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, a manifest error hath happened, to the great
 29 damage of the said The United States of America, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the* 29th day of November next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second.

B. R. COWEN,

[SEAL.]

Clerk of the Dist. Court of the United States.

Allowed by Hon. Albert C. Thompson, United States District Judge.

*Not exceeding 30 days from the day of signing the citation.

No. 1867. United States District Court Southern District of Ohio, Western Division. The United States of America vs. The Baltimore & Ohio Southwestern Railroad Company. Writ of Error. Filed Oct. 30, 1907. B. R. Cowen, Clerk.

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA, *Sixth Judicial Circuit, ss:*

To the Baltimore & Ohio Southwestern Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Sixth Circuit,

to be holden at the City of Cincinnati, in said Circuit, on the* 29th day of November next, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States for the Southern District of Ohio, Western Division, wherein The United States of America is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 30th day of October, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States of America the one hundred and thirty-second.

A. C. THOMPSON, *Judge.*

*Not exceeding 30 days from the day of signing.

November 4, 1907, the issue of summons in error is waived.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

*Attorneys for the Baltimore & Ohio
Southwestern Railroad Company.*

No. 1867. United States District Court, Southern District of Ohio, Western Division. The United States of America *vs.* The Baltimore & Ohio Southwestern Railroad Company. Citation. Filed November 4, 1907, B. R. Cowen, Clerk.

31 And afterwards, to-wit: on the 5th day of November, A. D. 1907, a motion to advance was filed in said cause clothed in the words and figures as follows to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. —.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

Now comes the United States of America, by the United States Attorney, and moves to advance this cause upon the docket of the court, and to set a time for the hearing of same at the earliest possible moment, for the reason that it involves the construction of an Act of Congress, and a question of pleading, and the advancement will be of advantage not only to the United States, but also to the defendant.

SHERMAN T. McPHERSON,
United States Attorney, S. D. O.

United States Circuit Court of Appeals for the Sixth Circuit.

No. —.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

We hereby consent to the advancement of this cause, and hope the court will agree to the motion filed by the District Attorney, and that the cause will be advanced for hearing at the earliest possible moment.

Very respectfully,

HARMON, COLSTON, GOLDSMITH
& HOADLY,
Attorneys for B. & O. S. W. Ry. Co.

And afterwards, to-wit: on the 5th day of November, A. D., 1907, an entry was made on the journal of said court clothed in the words and figures as follows, to-wit:

No. 1770.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO SOUTHWESTERN R. R. Co.

and

32

No. 1771.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO SOUTHWESTERN R. R. Co.

Motion to advance these causes is argued by Mr. Sherman T. McPherson, U. S. Attorney, on behalf of the motion and by Mr. Edward Colston, contra, and is submitted.

And afterwards, to-wit: on the 8th day of November, A. D., 1907, an entry was made on the journal of said court clothed in the words and figures as follows, to-wit:

No. 1770.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO SOUTHWESTERN R. R. Co.
and

No. 1771.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO SOUTHWESTERN R. R. Co.

The motions to advance these cases are granted and the cases are set for hearing on the first day of the January session, 1908.

And afterwards, to-wit: on the 18th day of December, A. D., 1907, a stipulation was filed in said cause clothed in the words and figures, as follows, to-wit:

In the United States Circuit Court of Appeals for the Sixth Circuit.

Nos. 1770 and 1771.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

Stipulation entered into between Sherman T. McPherson, United States Attorney, S. D. O., and Harmon, Colston, Goldsmith and Hoody, attorneys for defendant.

It is agreed by and between the parties to these suits that in the hearing of these causes, the same being numbered 1866 and 1867, respectively, in the District Court, the remaining causes consolidated with said cause No. 1866, to-wit: Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884, in the District Court, shall be controlled and disposed of in accordance with the decision of the Circuit Court of Appeals rendered in causes numbered 1770 and 1771; and
33 that certified copies of the records in said causes Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884, shall be filed in the Circuit Court of Appeals, as part of said cause No. 1770 in said court, but not printed and counsel shall have the privilege to refer to and use any part of said record as they may desire.

Endorsed: Nos. 1770 and 1771. U. S. Circuit Court of Appeals for the Sixth Circuit. The United States of America, Plaintiff in Error, vs. The Baltimore & Ohio Southwestern Railroad Company,

Defendant in Error. Stipulation. Agreed to. Harmon, Colston, Goldsmith & Hoadly, Attorneys for Defendant in Error. Sherman T. McPherson, United States Attorney. Filed December 18, 1907. Frank O. Loveland, Clerk.

34 And afterwards towit on the 18th day of December, 1907, a supplemental record was filed in cause No. 1770, clothed in the words and figures as follows:

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, towit: On the Twenty-Seventh day of November, in the year of our Lord One Thousand Nine Hundred and Seven, an entry was made upon the journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 429.

Entry of Consolidation.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1866.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

This cause coming on to be heard upon the motion of the defendant to consolidate this cause with causes numbered 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884 on the docket of this Court, for the reasons appearing in the answers filed in said several causes, and the court being fully advised in the premises, sustains said motion and orders that causes numbered 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884 be and the same are hereby consolidated with this cause to which ruling of the court

35 plaintiff, the United States of America, excepts; and it is further ordered that this entry be placed on the records of the Court as of date of September 11, 1907.

Be it remembered, That heretofore, towit, on the twenty-second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain Petition in this cause against the Defendant herein, which said Petition is clothed in the words and figures, following, towit:

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, one Shan Chapman, of Ridgeway, Illinois, shipped over the road of the said, The Baltimore & Ohio Southwestern Railroad Company to Jennings, McDonald & Co., of Cincinnati, Ohio, live stock consisting of thirty (30) cattle and one (1) calf, contained in B. & O. Car No. 11939; that the loading of the live stock, aforesaid, was done and completed at Ridgeway, Illinois, on February 2nd, 1907, at one-forty-five o'clock (1:45) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-ten o'clock (11:10) A. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being forty-five (45) hours and twenty-five (25) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the car, above designated namely, B. & O. car No. 11969, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that said live stock was continuously confined within the said car for a period of more than forty-five (45) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at

least five consecutive hours; and further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio South-western Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

37

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,
U. S. Attorney, S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me and subscribed in my presence, this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,
Notary Public in and for Hamilton County, Ohio.

And afterwards to wit, but on the same day, the following Præcipe for summons was filed in the Clerk's Office of the Court aforesaid, which said Præcipe is clothed in the words and figures following, to wit:

Præcipe for Summons.

Southern District of Ohio, Western Division.

United States District Court.

No. 1867.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

38 And afterwards, to-wit, but on the same day, there was issued out of the Clerk's Office of the said Court aforesaid, our certain summons, directed to the Marshal of said District and against the Defendant herein, which said summons is clothed in the words and figures following, to-wit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify the Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said plaintiff The United States of America against it be filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

Summons endorsed: Summons in Action for Money only. Returnable according to law. Amount claimed \$500.00, and costs.

39 And afterwards, towit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid Summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, towit:

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber,

Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or Chief officer being found in this District.
Total Fees \$2.30.

EUGENE L. LEWIS, *Marshal*,
By E. E. McGUIRE, *Deputy*.

And afterwards, to-wit: on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry Journal 9, Page 354.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, to-wit, on the 4th day of May, A. D. 1907, the following answer was filed in the Clerk's Office of the Court aforesaid, which said answer is clothed in the words and figures following, to-wit:

40

Answer.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one Sam Chapman of Ridgeway, Illinois, and was consigned to Jennings, McDonald & Co., of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and des-

ignated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to wit:

One shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 Hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought

by the plaintiff against this defendant and numbered on the docket of this court 1874.

And also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County*, ss:

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

44 And afterwards, towit, on the 7th day of May, A. D. 1907, the following motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number 1866, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May, A. D. 1907, the following motion for judgment was filed in the Clerk's Office of the Court aforesaid, which said motion is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1867.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
a Corporation, Defendant.

Motion.

45 Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwith-

standing the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. McPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, to wit, on the 24th day of August, A. D. 1907, the following Memorandum of Judge Thompson was filed in the Clerk's Office of the Court aforesaid, which said Memorandum is clothed in words and figures following, to wit:

Memorandum of Judge Thompson.

In the United States District Court, Southern District of Ohio, Western Division.

1867.

THE UNITED STATES OF AMERICA

vs.

THE BALTIMORE AND OHIO SOUTHWESTERN RAILROAD COMPANY.

Memorandum.

This is an action brought by the United States under Section 4, of the Act of Congress of June 29, 1906, entitled, "An Act to prevent cruelty to animals while in transit by railroad," etc.

The petition alleges that Shan Chapman, of Ridgeway, Illinois, — McDonald & Company, of Cincinnati, Ohio, live stock—"consisting of thirty cattle and one calf," contained in the defendant's car No. 11909. That the loading of the live stock aforesaid was done and completed at Ridgeway, Illinois, on February 2, 1907, at 1:45 P. M., and that the unloading of said live stock at Cincinnati, Ohio, was not begun until 11:10 A. M. on February 4, 1907, the entire time en route from place of shipment to place of destination being forty-five hours and twenty-five minutes.

46 It further alleges that these animals were continuously confined in the car for a period longer than twenty-eight hours without rest, water or food, and prays judgment against the defendant in the sum of five hundred dollars.

The defendant answers, admitting the allegations of the petition, but alleges that eleven other shipments of animals by ten other shippers, from seven different places in Illinois, to three different consignees in Cincinnati, Ohio, were carried by the same train and that suit has been brought by the United States in this Court against the defendant to recover separate penalties for each of these shipments, and moves the Court to consolidate this cause with said other causes, in order that there may be a recovery of but one penalty for all the shipments.

The Statute provides:

"SEC. 1. That no railroad * * * whose road forms any part of a line of road over which cattle, sheep, swine or other animals

shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, in properly equipped pens for rest, water, and feeding, for a period of at least five consecutive * * *

"SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having custody thereof, or in case of default in so doing, then by the railroad * * * at the reasonable expense of the owner or person in custody thereof."

Here the train carried distinct shipments and the railroad company was necessarily compelled to deal with them as such in every respect but one, namely, the unloading of the animals for rest, feed, and water. The company could not, without violating the law, unload some of the shipments to the exclusion of the others, nor extend the time of confinement of some of them without the written consent of all. The law requires the railroad company to stop its train carrying animals, once in every twenty-eight hours and unload the animals for rest, feed and water, and imposes a penalty for the failure to do so. It deals with the operations of these trains, not with the different shipments which the trains may carry.

The motion will be sustained.

And afterwards, to wit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to wit:

Entry Journal 9, Page 385.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, the United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the Court, and the Court being duly advised, in the premises, overrules said motion, and The United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, to wit, but on the same day, an entry was made upon the Journal of the Court aforesaid which said entry is clothed in the words and figures following, to wit:

Entry Journal 9, Page 388.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated

with cause No. 1866 in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division,

48

No. 1868.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be It Remembered, That heretofore, towit, on the 22nd day of March, in the year of our Lord One thousand Nine Hundred and Seven, came the plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the defendant herein, which said petition is clothed in the words and figures, following, towit:

Petition.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, the firm of Mason & Kemmer, of Louisville, Illinois, shipped over the road of the said, The
49 Baltimore & Ohio Southwestern Railroad Company to Snowden, Seal & Richey,—a partnership,—of Cincinnati, Ohio, live stock consisting of twenty-six (26) cattle, four (4) calves, and ninety-six (96) hogs, contained in B. & O. Cars Nos. 12019 and 12321; that the loading of the live stock, aforesaid, was done and

completed at Louisville, Illinois, on February 2nd, 1907, at two-thirty o'clock (2:30) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-twenty-five o'clock (11:25) A. M., on February 4th, 1907; the entire time en route from the place of shipment to destination, aforesaid, being forty-four (44) hours and fifty-five (55) minutes.

That the said, The Baltimore & Ohio Southwestern Railroad Company was given written request by the person accompanying said shipment of live stock, above described, to extend the time of confinement of said live stock to thirty-six (36) hours; and that the said defendant thereupon had the right to extend the time of confinement of said live stock to thirty-six (36) hours.

Affiant further says that the said live stock, above described, was continuously confined in the cars above designated, namely, B. & O. cars Nos. 12019 and 12321, for a period longer than thirty-six (36) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that the said live stock was continuously confined within the said cars for a period of nearly forty-five (45) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,
U. S. Atty, S. D. O.

STATE OF OHIO, *Hamilton County*, ss:

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence, this 22nd day of March, 1907.

EDW. MOULINIER,
Notary Public in and for Hamilton County, Ohio.

And afterwards, towit:—but on the same day, the following *Præcipe* for summons was filed in the Clerk's Office of the Court aforesaid, which *Præcipe* is clothed in the words and figures following, towit:—

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division*:

United States District Court,

No. 1868.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

51 Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,

Attorney for U. S.

And afterwards, to-wit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain *Summons*, directed to the Marshal of said District and against the defendant herein, which said summons is clothed in the words and figures following, to-wit:

Summons.

THE UNITED STATES OF AMERICA,

Southern District of Ohio, Western Division, ss:

The President of the United States of America, to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify the Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the Dis-

[SEAL.] tric- Court of the United States, this 22nd day of March,
A. D. 1907, and in the 131st year of the Independence of
the United States of America.

52 Attest:

B. R. COWEN, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

Summons Endorsed: Summons in Action for money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to-wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, to-wit:

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John C. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this district.
Total fees, \$2.30.

EUGENE L. LEWIS, *Marshal*,
By E. E. McGUIRE, *Deputy*.

And afterwards, to-wit: on the 19th day of April A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to-wit:

Entry—Journal 9, Page 354.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days' further time is given to defendant within which to plead.

53 And afterwards, to-wit, on the 4th day of May, A. D. 1907, the following answer was filed in the Clerk's Office of the Court aforesaid, which said answer is clothed in the words and figures following, to-wit:

Answer.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1868.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTH WESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one Mason & Kemmer, of Louisville, Illinois, and was consigned to Snowden, Seal & Richey, Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to-wit:

One shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1873.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against
55 this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this Court 1874.

Also one shipment made by J. A. Books, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal and Richey, of Cincinnati, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours
56 without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said ship-

ment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding in the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH &
HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

57 And afterwards, towit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:—

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1868.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the Court to consolidate this cause with causes number- 1866, 1867, 1869, 1870, 1871, 1872, 1873,

1874, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May, A. D. 1907, the following Motion for judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for judgment is clothed in the words and figures following, towit:—

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1868.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 385.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court, being fully advised in the premises, overrules said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 388.

Cause Consolidated with Cause No. 1866.

Upon motion of the defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff
59 herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1869.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, to wit, on the Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein. The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the defendant herein, which said petition is clothed in the words and figures, following, to wit:—

Petition.

District Court of the United States, Southern District of Ohio,
Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line
60 of road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation

has offices and carries on business in the City of Cincinnati, and State of Ohio:

That on February 2nd, 1907, one Walter Van Gilder, of Sumner, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Hubbard, Hauss & Ragsdale, (a partnership), of Cincinnati, Ohio, live stock, consisting of one hundred and eighty hogs; that the loading of the live stock, aforesaid, was done and completed at Sumner, Illinois, on February 2nd, 1907, at ten o'clock (10:00) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until twelve-twenty-five o'clock (12:25) P. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being thirty-eight (38) hours and twenty-five (25) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the car in which same was shipped, for a period longer than twenty-eight hours (28) without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that said live stock was continuously confined within the said car for a period of more than thirty-eight (38) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further that the said live stock, above described, were carried in cars in which they could not and did not have proper food, and water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,

By SHERMAN T. McPHERSON,

U. S. Att'y, S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being duly first sworn says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence, this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,
Notary Public in and for
Hamilton County, Ohio.

And afterwards, to-wit: but on the same day, the following Præcipe for summons was filed in the Clerk's Office of the Court aforesaid, which said Præcipe is clothed in the words and figures following, to-wit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division*:

No. 1869.

United States District Court.

U. S.

vs.

B. & O. S. W. R. R. C.

To Benjamin R. Cowen, Clerk of said Court:

62 Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,

Attorney for U. S.

And afterwards, to-wit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain summons, directed to the Marshal of said District and against the defendant herein, which said summons is clothed in the words and figures following, to-wit:

Summons.

THE UNITED STATES OF AMERICA,

Southern District of Ohio, Western Division, ss:

The President of the United States of America, to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant citizen of and resident in the States of Ohio and Indiana, if it be found in your district, that it has been sued by the United States of America, Plaintiff, in the United States District Court, within and for the District and Division aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said Plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District

[SEAL.] Court of the United States, this 22nd day of March, A. D. 1907, and in the 131st year of the Independence of the United States of America.

63

Attest:

B. R. COWEN, *Clerk*,
By C. P. WHITE, JR., *Deputy*.

Summons Endorsed: Summons in Action for money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to-wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed which said proceedings are clothed in the words and figures following, to-wit:

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this district.

Total fees—\$2.30.

EUGENE L. LEWIS,
By E. E. MCGUIRE, *Deputy*.

And afterwards, towit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 354.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

64

And afterwards, towit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1869.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio, and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one Walter Van Gilder, of Sumner, Illinois, and was consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to wit:

One shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 Hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof

an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and
66 which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action
has been brought by the plaintiff against this defendant and
67 numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been

brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble Illinois, consisting of 129 hogs, 39 cattle, and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

68 STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, towit, on the 7th day of May, A. D. 1907, the following motion to consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1869.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number 1866, 1867, 1868, 1870, 1871, 1872, 1873, 1874, 1878, 1879, and 1880, brought by the plaintiff herein for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May, A. D. 1907, the following Motion for Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed
69 in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1869.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, page 386.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the Court, and the Court, being fully advised in the premises, overrules said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio excepts.

70 And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 388.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff, and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1870.

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

THE BALTIMORE & OHIO SOUTHERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, towit, on the Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the Defendant herein, which said Petition is clothed in the words and figures, following, towit:

Petition.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

71 Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; That its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of said road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into, or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, one, Wm. F. Harrell, on Omaha, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Rabenstein, Harris & Conner, of Cincinnati, Ohio, live stock consisting of seventy (70) cattle, two (2) calves and seventy-five (75) hogs, contained in the following cars: B. & O. Nos. 11762 and 10725; S. W. S. C. No. 2387, and C. C. C. No. 1617; that the loading of the live stock, aforesaid, was done and completed at Omaha, Illinois, on February, 2nd, 1907, at two-fifteen o'clock (2:15) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-thirty-five o'clock (11:35) A. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being forty-five (45) hours and twenty (20) minutes.

That the said defendant, The Baltimore & Ohio Southwestern Railroad Company was given written request by owner and person accompanying said shipment of live stock, above described, to extend the time of confinement of said live stock to thirty-six (36) hours; and that said defendant thereupon had the right to extend the time of confinement of said live stock to thirty-six (36) hours.

Affiant further says that the said live stock, above described,
72 was continuously confined in the cars above designated, for a period longer than thirty-six (36) hours, without rest, water or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that the said live stock was continuously confined within the said cars for a period of more than forty-five (45) hours without being unloaded for rest, water, and

feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,
U. S. Att'y, S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence this
73 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,

Notary Public in and for Hamilton County, Ohio.

And afterwards, to-wit, but on the same, the following Præcipe for summons was filed in the Clerk's Office of the Court aforesaid, which said Præcipe is clothed in the words and figures following, to-wit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division:*

United States District Court.

No. 1870.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

And afterwards, to-wit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain Summons, directed to the Marshal of said District and against the defendant herein, which said Summons is clothed in the words and figures following, towit:—

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

74 You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by the United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said plaintiff The United States of America, against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

-tiness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, A. D. [SEAL.] 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk.*

By C. P. WHITE, JR., *Deputy.*

Summons Endorsed: Summons in Action for Money only. Returnable according to law. Amount claimed \$500.00, and costs.

And afterwards, towit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, towit:—

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this District.

EUGENE L. LEWIS, *Marshal,*
By E. E. McGUIRE, *Deputy.*

Total fees, \$2.30.

And afterwards, towit:—on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 354.

Defend-t Given Twenty Days' Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days' further time is given to defendant within which to plead.

And afterwards, towit, on the 14th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:—

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1870.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is
76 a line of road over which cattle, swine or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by William F. Harrell, of Omaha, Illinois, and was consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati, on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, towit:

One shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was

likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by Walter Van Gilder, and Ber McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs, and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account

whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn, says that he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JOHN G. WALBER.

Sworn to before me and subscribed in my presence this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, towit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1870.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

80 Now comes the defendant and moves the court to consolidate this cause with causes number 1865, 1867, 1868, 1869, 1871, 1872, 1873, 1874, 1878, 1879, and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May A. D. 1907, the following Motion for Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1870.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, Plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, towit, on the 11th day of September, A. D. 1907, and entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

81

Entry Journal 9, Page 386.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court, being duly advised in the premises, overruled said motion, and The United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 388.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1871.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, towit, on the Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein, The United States
82 of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the Defendant herein, which said petition is clothed in the words and figures following, towit:—

Petition.

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of said road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has office and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, Walter Van Gilder and Ber McCane, of Sumner, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Hubbard, Hauss & Ragsdale (a partnership), of Cincinnati, Ohio, live stock consisting of twenty-five (25) cattle and ninety (90) hogs, contained in cars B. & O. No. 12105 and B. & O. S. W. No. 9008;

83 that the loading of the live stock, aforesaid, was done and completed at Sumner, Illinois, on February 2nd, 1907, at eleven o'clock (11:00) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until twelve-thirty o'clock (12:30) P. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being thirty-seven (37) hours and thirty (30) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the cars above designated, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that said live stock was continuously confined within the said cars for a period of more than thirty-seven (37) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the

live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,
U. S. Att'y, S. D. O.

84 STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence, this 22nd day of March, 1907.

[SEAL]

EDW. MOULINIER,
Notary Public in and for Hamilton County, Ohio.

And afterwards, towit, but on the same day, the following Praeipe for Summons was filed in the Clerk's Office of the Court aforesaid, which said Praeipe is clothed in the words and figures following, towit:

Praeipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division:*

United States District Court.

No. 1871.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, clerk of said court:

Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

And afterwards, towit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain summons, directed to the Marshal of said District and against the defendant herein, which said summons is clothed in the words and figures following, towit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, A. D. [SEAL.] 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
 By C. P. WHITE, JR., *Deputy*.

Summons Endorsed: Summons in action for money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid Summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed which said proceedings are clothed in the words and figures following, to wit:

Marshal's Return.

Received, this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this District.
 Total fees \$2.30.

EUGENE L. LEWIS,
 By E. E. McGUIRE, *Deputy*.

And afterwards, to wit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, to wit:

Entry Journal 9, Page 355.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, towit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:

Answer.

District Court of the United States, Southern District of Ohio, Western Division.

87

No. 1871.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes The Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, and was consigned to Hubbard Hauss & Ragsdale, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to-wit:

One shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest on account whereof an action has been brought

by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant
88 more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Masen & Kemmer, of Louisville Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harwell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein Harris & Conner, of Cincinnati, Ohio, and which said shipment it — alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered
89 on the docket of this court 1867.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle, and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

90 Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle, and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this Court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County*, ss:

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

91 And afterwards, towit on the 7th day of May, A. D. 1907, the following Motion to consolidate was filed in the Clerk's

Office of the Court aforesaid, which said Motion is clothed in the words and figures following, to-wit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1871.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number- 1866, 1867, 1868, 1869, 1870, 1872, 1873, 1874, 1878, 1879 and 1880, brought by the plaintiff herein for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May, A. D. 1907, the following Motion for Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1871.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

92 Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,
United States Attorney for the Southern District of Ohio.

And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 386.

Motion for Judgement Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the Court, and the Court, being duly advised in the premises, overrules said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 389.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

93 In the District Court of the United States, Southern District of Ohio, Western Division.

No. 1872.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, towit, on the Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain Petition in this cause against the Defendant herein, which said Petition is clothed in the words and figures following, towit:

Petition

District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of, and is a line of said road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through
94 another State of The United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio:

That on February 2nd, 1907, one, J. H. Brown, of Iola, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Snowden, Seal & Richey (a partnership), of Cincinnati, Ohio, live stock consisting of eighty-nine (89) hogs and three (3) calves, contained in B. & O. car No. 12290; that the loading of the live stock, aforesaid, was done and completed at Iola, Illinois, on February 2nd, 1907, at three o'clock (3:00) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-fifteen o'clock (11:00) A. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being forty-four (44) hours and fifteen (15) minutes;

That the said Defendant, The Baltimore & Ohio Southwestern Railroad Company was given written request by the owner and person accompanying said shipment of live stock, above described, to extend the time of confinement of said live stock to thirty-six (36) hours; and that the said defendant thereupon had the right to extend the time of confinement of said live stock to thirty-six (36) hours.

Affiant further says that the said live stock, above described, was continuously confined in the car, above designated, namely, B. & O. car No. 12290, for a period longer than thirty-six (36) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that the said live stock was continuously confined within the said car for a period of more than forty-four (44) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and

willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,

U. S. Att. S. D. O.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,

Notary Public in and for Hamilton County, Ohio.

And afterwards, towit, but on the same day, the following *Præcipe* for Summons was filed in the Clerk's Office of the Court aforesaid, which said *Præcipe* is clothed in the words and figures following, towit:

Præcipe for Summons.

Southern District of Ohio, Western Division.

United States District Court.

No. 1872.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,

Attorney for U. S.

And afterwards, towit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain summons, directed to the Marshal of said District and against the defendant herein, which said summons is clothed in the words and figures following, towit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said Plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, [SEAL.] A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk,*
By C. P. WHITE, Jr., *Deputy.*

Summons endorsed: Summons in Action for Money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, towit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, towit:—

Marshal's Return.

Received This writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher or chief officer being found in this District.

Total Fees \$2.30.

EUGENE L. LEWIS, *Marshal,*
By E. E. McGUIRE, *Deputy.*

And afterwards, towit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 355.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, towit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1782.

THE UNITED STATES OF AMERICA, Plaintiff,

VS.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one J. H. Brown, of Iowa, Illinois, and was consigned to Snowden, Seal & Richey, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, towit:

One shipment made by Sam Chapman of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald

& Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereon an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, and which said shipment it — alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof of action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account
100 whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Ber McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is al-

leged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle, and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH &
HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn says, he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, towit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1872.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this case with causes number 1866, 1867, 1868, 1869, 1870, 1871, 1873, 1874, 1878, 1879, and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 8th day of May, A. D. 1907, the following Motion for Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1872.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plain- herein, and moves for judgment notwithstanding the answer by the defendant, for the reason that the answer admits all the allegations in the petition.

SHERMAN T. McPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 386.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court, being duly advised in the premises, overrules said motion, and the United States of America, by Sherman T. 104 McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 389.

Cause Consolidated With Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff, and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1873

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the defendant herein, which said petition is clothed in the words and figures following, towit:

Petition.

District Court of the United States, Southern District of Ohio,
Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

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Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of said road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, Brian, Shick & Co., of Sumner, Illinois, shipped over the road of said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Hubbard, Hauss & Ragsdale, (a partnership), of Cincinnati, Ohio, live stock consisting of one hundred and five (105) hogs and four (4) sheep and three (3) calves, contained in B. & O. car No. 11854; that the loading of the live stock, aforesaid, was done and completed at Sumner, Illinois, on February 2nd, 1907, at ten o'clock (10:00) P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven ten (11:10) o'clock A. M., on February 4th, 1907; the entire time en route, from the place of shipment to destination, aforesaid, being thirty-seven (37) hours and ten (10) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the car above designated, namely, B. & O. car No. 11854, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that said live stock was continuously confined within said car for a period of more than thirty-seven (37) hours without being unloaded for rest,
106 water, and feeding, or either; and that said defendant knowingly and wilfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further that the said live stock above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the live

stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON.

STATE OF OHIO, *Hamilton County*, ss:

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me, and subscribed in my presence, this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,
Notary Public in and for Hamilton County, Ohio.

107 And afterwards, towit, but on the same day, the following Præcipe for Summons was filed in the Clerk's Office of the Court aforesaid, which said Præcipe is clothed in the words and figures following, towit:

Præcipe for Summons.

Southern District of Ohio, Western Division.

United States District Court.

No. 1873.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law: amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

And afterwards, towit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain summons, directed to the Marshal of said District and against the defendant herein, which said Summons is clothed in the words and figures following, towit:

Summons.

THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by the United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said Plaintiff The United States of America against it filed in the Clerk's Office of said court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March, A. D. [SEAL.] 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
 By C. P. WHITE, Jr., *Deputy*.

Summons Endorsed: Summons in Action for Money only. Returnable according to law. Amount claimed \$500.00 and costs.

And afterwards, to-wit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, to-wit:

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found in this District.

109 Total fees—\$2.30

EUGEN L. LEWIS, *Marshal*,
 By E. E. McGUIRE, *Deputy*.

And afterwards, towit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 355.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

And afterwards, towit, on the 4th day of May, A. D. 1907, the following answer was filed in the Clerk's Office of the Court aforesaid, which said answer is clothed in the words and figures following, towit:

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1873.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of
road over which cattle, swine, or other animals are conveyed
110 from one State of the United States into or through another
State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one Brian, Shick & Co., of Sumner, Illinois, and was consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati, on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, towit:

One shipment made by Sam Chanman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-

eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this
111 defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by J. A. Brooks, of Louisville,
112 Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon, Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harrise & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments
113 therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County*, ss:

John G. Walber, being first duly sworn, says that he is Ass't General Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me, and subscribed in my presence this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, towit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the

Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio, Western Division.

114

No. 1873.

THE UNITED STATES OF AMERICA, Plaintiff,

*vs.*THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number- 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1874, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,*Attorneys for Defendant.*

And afterwards, towit, on the 8th day of May, A. D. 1907, the following Motion for judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1873.

THE UNITED STATES OF AMERICA, Plaintiff,

*vs.*THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reasons that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

United States Attorney for the Southern District of Ohio.

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115 And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry, Journal 9, Page 387.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court, being duly advised in the premises, overruled said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry, Journal 9, Page 389.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

No. 1874.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

116 Be it remembered, That heretofore, towit, on the Twenty-Second day of March, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain Petition in this cause against the Defendant, herein, which said Petition is clothed in the words and figures following, towit:

Petition.

District Court of the United States, Southern District of Ohio,
Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of and is a line of said road over which cattle, sheep, swine or other animals are conveyed from one State of the United States into or through another State of the United States, and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio;

That on February 2nd, 1907, one, A. Louis Oder, of Olney, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Snowden, Seal & Richey (a partnership), of Cincinnati, Ohio, live stock consisting of seventy-five (75) hogs and three (3) calves, contained in C. L. & W. car No. 2033; that the loading of the live stock, aforesaid, was done and completed at Olney, Illinois, on February 2nd, 1907, at ten (10:00) o'clock P. M., and that the unloading of the said live stock
117 at Cincinnati, Ohio, was not begun until eleven-ten (11:10) o'clock A. M., on February 4th, 1907; the entire time en route from the place of shipment to destination, aforesaid, being thirty-seven (37) hours and ten (10) minutes;

That the said defendant, The Baltimore & Ohio Southwestern Railroad Company was given written request by the owner and person accompanying said shipment of live stock, above described, to extend the time of confinement of said live stock to thirty-six (36) hours; and that the said defendant thereupon had the right to extend the time of confinement of said live stock to thirty-six (36) hours.

Affiant further says that the said live stock, above described, was continuously confined in the car above designated, namely, C. L. & W. car No. 2033, for a period longer than thirty-six (36) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company, and that the said live stock was continuously confined within the said car for a period of more than thirty-seven (37) hours without being unloaded for rest, water, and feeding or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of

at least five consecutive hours; and further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress, of June 29th, 1906, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress the Plaintiff, the United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me and subscribed in my presence this 22nd day of March, 1907.

[SEAL.]

EDW. MOULINIER,

Notary Public in and for Hamilton County, Ohio.

And afterwards, to wit, but on the same day, the following *Præcipe* for Summons was filed in the Clerk's' Office of the Court aforesaid, which said *Præcipe* is clothed in the words and figures following, to wit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION:

United States District Court.

No. 1874.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

119 And afterwards, towit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain summons, directed to the Marshal of said District and against the Defendant herein, which said Summons, is clothed in the words and figures following, towit:—

Summons.

UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, Defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 20th day of April, A. D. 1907, the petition of the said Plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the first day of April, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 22nd day of March A. D. [SEAL.] 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk.*
By C. P. WHITE, JR., *Deputy.*

Summons Endorsed: Summons in Action for Money only. Returnable according to law. Amount claimed \$500.00 and costs.

120 And afterwards, towit, on the 25th day of March, A. D. 1907, came the Marshal of said District, to whom the aforesaid Summons was in due form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, towit:—

Marshal's Return.

Received this writ on the 22nd day of March, A. D. 1907, and on the 23rd day of March, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company, by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati,

Ohio; no higher representative or chief officer being found in this District.

EUGENE L. LEWIS, *Marshal*,
By E. E. McGUIRE, *Deputy*.

Total fees, \$2.30.

And afterwards, towit, on the 19th day of April, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 355.

Defendant Given Twenty Days Further Time Within Which to Plead.

Now upon motion and by consent of the District Attorney twenty days further time is given to defendant within which to plead.

121 And afterwards, towit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:

Answer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1874.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & — Southwestern Railroad Company and by way of answer to the petition says that it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine and other animals are conveyed from one State of the United States into or through another State of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by one A. Louis Oder, of Olney, Illinois, and was consigned to Snowden, Seal & Richey, of Cincinnati, Ohio; that the said shipment was forwarded to said

Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to wit:

One shipment by Sam Chapman, of Ridgway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was
122 likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Schick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kenner, of Louisville, Illinois, consisting of 26 cattle, 4 calves, and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against
123 this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner, Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought

by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, 124 Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 129 hogs, 39 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1880.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County*, ss:

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

125 Sworn to before me and subscribed in my presence, this
3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards towit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1874.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this cause with causes number- 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1878, 1879 and 1880, brought by the plaintiff herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards towit on the 8th day of May, A. D., 1907, the following Motion for Judgment was filed in the Clerk's Office of the Court aforesaid, which said Motion for Judgment is clothed in the words and figures following, towit:

Motion for Judgment.

District Court of the United States, Southern District of Ohio, Western Division.

#1874.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

126 Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding—342

standing the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. McPHERSON,

United States Attorney for the Southern District of Ohio.

And afterwards towit on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 387.

Motion for Judgment Overruled.

This cause coming on to be heard upon the motion of the plaintiff, the United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the Court, being duly advised in the premises, overrules said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 389.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the court it is ordered that this cause be, and the same hereby is, consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Western Division.

127

No. 1880.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it remembered, That heretofore, towit, on the Twelfth day of April, in the year of Our Lord One Thousand Nine Hundred and Seven, came the plaintiff herein, the United States of America, by its attorney, and filed in the Clerk's Office of the Court aforesaid, its certain petition in this cause against the defendant herein, which said petition is clothed in the words and figures, following, towit:

Petition.

District Court of the United States Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the states of Illinois, Indiana and Ohio, and said road forms a part of, and is a line of said road over which cattle, sheep, swine or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio.

That on February 2nd, 1907, the firm of Shannon Bros. & Henry, of Noble, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to Snowden,

Seal & Richey (a partnership), of Cincinnati, Ohio, live
128 stock consisting of one hundred and twenty-nine (129) hogs, thirty-nine (39) cattle and four (4) calves, contained in B. & O. cars Nos. 11750, 9178, and 12004; that the loading of the live stock, aforesaid, was done and completed at Noble, Illinois, on February 2nd, 1907, at seven-fifteen (7:15) o'clock P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-ten (11:10) o'clock A. M., on February 4th, 1907, the entire time en route, from the place of shipment to destination, aforesaid, being thirty-nine (39) hours and fifty-five (55) minutes.

Affiant further says that the said live stock, above described, was continuously confined in the cars above designated, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company, and that said live stock was continuously confined within the said cars for a period more than thirty-nine hours (39), without being unloaded for rest, water and feeding, or either; and that the said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1906, in failing to unload the

live stock, aforesaid, and give them proper food, water, space and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff the United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
SHERMAN T. McPHERSON,

U. S. Attorney.

129 STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

Sworn to before me and subscribed in my presence, this 12th day of April, 1907.

[SEAL.]

EDW. MOULINIER,

Notary Public in and for Hamilton County, Ohio.

And afterwards, towit, but on the same day, the following *Præcipe* for Summons was filed in the Clerk's Office of the Court aforesaid, which said *Præcipe* is clothed in the words and figures following, towit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division:*

United States District Court.

No. 1880.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; action for money only, amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,
Attorney for U. S.

And afterwards, towit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain Summons, directed to the Marshal of said District and against the Defendant herein, which said Summons is clothed in the words and figures following, towit:

130

Summons.

THE UNITED STATES OF AMERICA,

Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by the United States of America, Plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 11th day of May, A. D., 1907, the petition of the said plaintiff, The United States of America, against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 22nd day of April, A. D., 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 12th day of April, A. D. [SEAL.] 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By B. E. DILLEY, *Deputy*.

Summons Endorsed: Summons in Action for Money Only.
Amount claimed \$500.00 and costs.

And afterwards, towit; on the 16th day of April, A. D. 1907, came the Marshal of said District, to whom the aforesaid summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which
131 said proceedings are clothed in the words and figures following, towit:

Marshal's Return.

Received this writ on the 13th day of April, A. D. 1907, and on the 13th day of April A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company by handing a true copy thereof with the endorsement thereon to John G. Walber, Assistant General Manager of said Company, at Cincinnati, Ohio; no higher representative or chief officer being found.

EUGENE L. LEWIS,
By L. J. HUWE, *Deputy*.

Total fees, \$2.30.

And afterwards, towit, on the 4th day of May, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid,

which said Answer is clothed in the words and figures following, to-wit:

Answer.

District Court of the United States, Southern District of Ohio, Western Division.

No. 1880.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition says it admits that it is a corporation organized under the laws of the States of Ohio and Indiana. It admits that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, swine, or other animals are conveyed from one State of the United States into or through another State
132 of the United States; and that it has offices and carries on business in the City of Cincinnati, Ohio.

Defendant admits the other allegations of the petition.

By way of a second and further defense it says that the shipment set out in the petition in this case was made by Shannon Bros. & Henry, of Noble, Illinois, and was consigned to Snowden, Seal & Richey, of Cincinnati, Ohio; that the said shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock, to-wit:

One shipment made by Sam Chapman, of Ridgeway, Illinois, consisting of 30 cattle and one calf, consigned to Jennings, McDonald & Co., of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1867.

Also one shipment made by Walter Van Gilder, of Sumner, Illinois, consisting of 180 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water (or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1869.

Also one shipment made by Brian, Shick & Co., of Sumner, Illinois, consisting of 105 hogs, 4 sheep and 3 calves, consigned to Hubbard, Hauss & Ragsdale, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-

eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1873.

Also one shipment made by Mason & Kemmer, of Louisville, Illinois, consisting of 26 cattle, 4 calves and 96 hogs, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1868.

Also one shipment made by William F. Harrell, of Omaha, Illinois, consisting of 70 cattle, 2 calves and 75 hogs, consigned to Rabenstein, Harris & Conner, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1870.

Also one shipment made by Walter Van Gilder and Bert McCane, of Sumner Illinois, consisting of 25 cattle and 90 hogs, consigned to Hubbard, Hauss & Ragsdale, of Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1871.

Also one shipment made by J. H. Brown, of Iola, Illinois, consisting of 89 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1872.

Also one shipment made by A. Louis Oder, of Olney, Illinois, consisting of 75 hogs and 3 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is
134 alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1874.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866.

Also one shipment made by G. E. Brown, of Parkersburg, Illinois, consisting of 73 hogs, 6 cattle and 9 calves, consigned to Snowden, Seal & Richey, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has

been brought by the plaintiff against this defendant and numbered on the docket of this court 1878.

Also one shipment made by Shannon Bros. & Henry, of Noble, Illinois, consisting of 24 cattle, consigned to Rabenstein, Harris & Conner, Cincinnati, Ohio, and which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1879.

This defendant further says that the allegations in the petitions in the said several causes, that the several respective shipments therein mentioned were delayed by this defendant on its line of road more than twenty-eight hours without food, water, or rest, are true, and that by reason thereof, the plaintiff is entitled to recover a penalty by reason of the said detentions; but this defendant says that

135 in the said several causes the said plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars, as fixed by law, which penalty, as the same may be assessed by a jury or by this court, it is ready and willing to pay, and it pleads the said several suits in bar to the recovery of more than said sum of five hundred dollars in all of the same.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County, ss:*

John G. Walber, being first duly sworn, says he is Ass't Gen. Manager of the above named defendant, a corporation, and that the statements of the foregoing answer are true as he verily believes.

JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 3rd day of May, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

And afterwards, to-wit, on the 7th day of May, A. D. 1907, the following Motion to Consolidate was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, to-wit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division,

No. 1880.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the defendant and moves the court to consolidate this
cause with causes number 1866, 1867, 1868, 1869, 1870, 1871,
136 1872, 1873, 1874, 1878 and 1879, brought by the plaintiff
herein, for reasons appearing in the answer filed herein.

HARMON, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant.

And afterwards, to wit, on the 8th day of May, A. D. 1907, the
following Motion for Judgment was filed in the Clerk's Office of the
Court aforesaid, which said Motion for Judgment is clothed in the
words and figures following, to wit.

Motion for Judgment.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1880.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Motion.

Now comes the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, plaintiff herein, and moves for judgment, notwithstanding the answer filed by the defendant, for the reason that the answer admits all the facts alleged in the petition.

SHERMAN T. MCPHERSON,

*United States Attorney for the
Southern District of Ohio.*

And afterwards, towit, on the 11th day of September, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 387.

Motion for Judgment Overruled.

137 This cause coming on to be heard upon the motion of the plaintiff, The United States of America, for judgment notwithstanding the answer filed by the defendant, the same being argued to the court, and the court, being duly advised in the premises overruled said motion, and the United States of America, by Sherman T. McPherson, United States Attorney for the Southern District of Ohio, excepts.

And afterwards, towit, but on the same day, an entry was made upon the journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 390.

Cause Consolidated with Cause No. 1866.

Upon motion of defendant and for good cause shown to the Court it is ordered that this cause be, and the same hereby is consolidated with cause No. 1866, in this court, in which the plaintiff herein is plaintiff and the defendant herein is defendant, to all of which the plaintiff excepts.

In the District Court of the United States, Southern District of Ohio,
Wester- Division.

No. 1884.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Be it Remembered, That heretofore, towit on the Third day of May, in the year of our Lord One Thousand Nine Hundred and Seven, came the Plaintiff herein, The United States of America, by its Attorney, and filed in the Clerk's Office of the Court aforesaid, its certain Petition in this cause against the Defendant herein, which said Petition is clothed in the words and figures following, towit:

Petition.

138 District Court of the United States, Southern District of Ohio, Western Division.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Petition.

Now comes Sherman T. McPherson, United States Attorney for the Southern District of Ohio, and for cause of action against the defendant, says that The Baltimore & Ohio Southwestern Railroad Company is a corporation organized under the laws of the States of Ohio and Indiana; that its railroad extends through the States of Illinois, Indiana and Ohio, and said road forms part of, and is a line of said road over which cattle, sheep, swine, or other animals are conveyed from one State of the United States into or through another State of the United States; and that said corporation has offices and carries on business in the City of Cincinnati, and State of Ohio:

That on February 2nd, 1907, the firm of Chaffin & Knowles, of Clay City, Illinois, shipped over the road of the said defendant, The Baltimore & Ohio Southwestern Railroad Company, to W. R. Crawford & Company, of Cincinnati, Ohio, live stock consisting of one hundred and eighty-six (186) hogs, twenty (20) cattle and two (2) calves, contained in B. & O. cars Nos. 12230, 9090 and 12411; that the loading of the live stock, aforesaid, was done and completed at Clay City, Illinois, on February 2nd, 1907, at eight-thirty (8:30) o'clock P. M., and that the unloading of the said live stock at Cincinnati, Ohio, was not begun until eleven-ten (11:10) o'clock A. M., on February 4th, 1907; the entire time en route from the place of shipment to destination, aforesaid, being thirty-eight (38) hours and forty (40) minutes.

139 Affiant further says that the said live stock, above described, was continuously confined, in the cars above designated, for a period longer than twenty-eight (28) hours, without rest, water, or food, by the said defendant, The Baltimore & Ohio Southwestern Railroad Company; and that said live stock was continuously confined within the said cars for a period of more than thirty-eight (38) hours without being unloaded for rest, water, and feeding, or either; and that said defendant knowingly and willfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in cars in which they could not and did not have proper food, water, space, and opportunity to rest, contrary to the provisions of the Act of Congress of June 29th, 1906, 34 Stat. at Large, p. 607.

Affiant further says that by reason of the said violation of the said Act of Congress of June 29th, 1907, in failing to unload the live stock, aforesaid, and give them proper food, water, space, and opportunity to rest, as prescribed by the said Act of Congress, the plaintiff, The United States of America, prays for judgment against the defendant, The Baltimore & Ohio Southwestern Railroad Company, in the sum of five hundred dollars (\$500.00) and costs of this action.

THE UNITED STATES OF AMERICA,
By SHERMAN T. McPHERSON,

U. S. Attorney.

STATE OF OHIO, *Hamilton County, ss:*

Sherman T. McPherson, being first duly sworn, says that he is the United States Attorney for the Southern District of Ohio, and that the facts stated in the above petition are true as he verily believes.

SHERMAN T. McPHERSON.

140 Sworn to before me, and subscribed in my presence, this
3rd day of May, 1907.

[SEAL.]

B. E. DILLEY,
Deputy Clerk, S. D. O.

And afterwards, to wit, but on the same day, the following *Præcipe* for Summons was filed in the Clerk's Office of the Court aforesaid, which said *Præcipe* is clothed in the words and figures following, to wit:

Præcipe for Summons.

SOUTHERN DISTRICT OF OHIO, *Western Division:*

United States District Court.

No. 1884.

U. S.

vs.

B. & O. S. W. R. R. Co.

To Benjamin R. Cowen, Clerk of said Court:

Please issue summons for above named defendant returnable according to law; Action for money only; amount claimed \$500.00 and costs.

SHERMAN T. McPHERSON,

Attorney for U. S.

And afterwards, to wit, but on the same day, there was issued out of the Clerk's Office of the Court aforesaid, our certain Summons, directed to the Marshal of said District and against the defendant herein, which said Summons is clothed in the words and figures following, to wit:

Summons.

THE UNITED STATES OF AMERICA,

Southern District of Ohio, Western Division, ss:

The President of the United States of America to the Marshal of the Southern District of Ohio, Greeting:

141 You are commanded to notify The Baltimore & Ohio Southwestern Railroad Company, a corporation, defendant, citizen of and resident in the States of Ohio and Indiana, if it be found in your District, that it has been sued by The United States of America, plaintiff, in the United States District Court, within and for the District and Division, aforesaid, at Cincinnati, and that unless it answer by the 1st day of June, A. D. 1907, the petition of the Plaintiff The United States of America against it filed in the Clerk's Office of said Court, such petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 13th day of May, A. D. 1907.

Witness the Honorable Albert C. Thompson, Judge of the District Court of the United States, this 3rd day of May, [SEAL.] A. D. 1907, and in the 131st year of the Independence of the United States of America.

Attest:

B. R. COWEN, *Clerk*,
By B. E. DILLEY, *Deputy*.

Summons endorsed: Summons in Action for Money only. Amount claimed \$500.00 and costs.

And afterwards, to wit, on the 4th day of May, A. D. 1907, came the Marshal of said District, to whom the aforesaid Summons was in form directed, and returned the same into the Clerk's Office of the Court aforesaid, with his proceedings thereon endorsed, which said proceedings are clothed in the words and figures following, to wit:—

Marshal's Return.

Received this writ on the 4th day of May, A. D. 1907, and on the 4th day of May, A. D. 1907, I served the within named The Baltimore & Ohio Southwestern Railroad Company, a corporation, by handing a true copy thereof *which* the endorsement thereon
142 to John G. Walber, Assistant General Manager of said Railroad Company, at Cincinnati: No chief officer or higher representative of said railroad company being found in this District.

Total fees, \$2.36.

EUGENE L. LEWIS, *Marshal*,
By E. E. McGUIRE, *Deputy*.

And afterwards, towit, on the 1st day of June, A. D. 1907, the following Demurrer was filed in the Clerk's Office of the Court aforesaid, which said Demurrer is clothed in the words and figures following, towit:—

Demurrer.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1884.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Demurrer.

Now comes the defendant and demurs to the petition herein upon the ground that the same does not state facts sufficient to constitute a cause of action.

HARMON, COLSTON, GOLDSMITH &
HOADLY,

Attorneys for Defendant.

And afterwards, towit, on the 18th day of October, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:—

Entry Journal 9, Page 414.

Leave Granted to Defendant to Withdraw Demurrer and File Answer.

143 Now upon motion the demurrer heretofore filed by the defendant in this case is withdrawn and leave given to defendant to answer.

And afterwards, towit; on the 18th day of October, A. D. 1907, the following Answer was filed in the Clerk's Office of the Court aforesaid, which said Answer is clothed in the words and figures following, towit:—

Answer.

District Court of the United States, Southern District of Ohio,
Wester- Division.

No. 1884.

THE UNITED STATES OF AMERICA, Plaintiff,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant.

Answer.

Now comes the Baltimore & Ohio Southwestern Railroad Company and by way of answer to the petition admits that it is a corporation organized under the laws of the States of Ohio and Indiana, and that its railroad extends through the States of Illinois, Indiana and Ohio, and that said road forms part of and is a line of road over which cattle, sheep, swine or other animals are conveyed from one State of the United States into or through another State of the United States, and that it has offices and carries on business in the City of Cincinnati, Ohio.

This defendant admits the other allegations in the petition contained.

By way of a second and further defense this defendant says that the shipment of animals set out in the petition in this case was made by Chaffin & Knowles, of Clay City, Illinois, and was consigned to W. R. Crawford & Company, of Cincinnati, Ohio; that said

144 shipment was forwarded to said Cincinnati on a certain train of this defendant known and designated as train No. 98, and that on said train there were also loaded and forwarded a certain other shipment of live stock, to wit: a shipment made by J. A. Brooks, of Louisville, Illinois, consisting of 53 hogs, 36 cattle and 4 calves, consigned to Snowden, Seal & Richey, of Cincinnati, Ohio, which said shipment it is alleged was likewise delayed by this defendant more than twenty-eight hours without food, water, or rest, on account whereof an action has been brought by the plaintiff against this defendant and numbered on the docket of this court 1866, and also divers other shipments on said train, to recover penalties by reason of which confinement suits have been brought by plaintiff against this defendant, which suits are numbered on the docket of this court 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874 and 1880, and that by reason thereof this defendant says that this suit ought to be consolidated with said suit 1866 and with said other suits hereinbefore mentioned, all of which have already been consolidated with said suit No. 1866, and that the plaintiff is entitled to recover but one penalty not exceeding the sum of five hundred dollars on account of the delays to the shipments in said several suits mentioned.

HARMON, COLSTON, GOLDSMITH &
HOADLY,

Attorneys for Defendant.

STATE OF OHIO, *Hamilton County*, ss:

John G. Walber, being first duly sworn, says he is the Ass't Gen. Manager of The Baltimore & Ohio Southwestern Railroad Company, a corporation, the defendant in the above entitled action, and that the statements of the foregoing answer are true as he verily believes.
JNO. G. WALBER.

Sworn to before me and subscribed in my presence, this 17th day of October, 1907.

[SEAL.]

ALVA W. GOLDSMITH,
Notary Public, Hamilton County, Ohio.

40¢ paid by H. C. G. & H.

145 And afterwards, towit, but on the same day, the following Motion was filed in the Clerk's Office of the Court aforesaid, which said Motion is clothed in the words and figures following, towit:

Motion to Consolidate.

District Court of the United States, Southern District of Ohio,
Western Division.

No. 1884.

THE UNITED STATES OF AMERICA

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

Motion.

Now comes the defendant and moves the court that this case be consolidated with case No. 1866 pending in this court between the same parties, for reasons appearing in the answers of this defendant in said two cases.

HARMON, COLSTON, GOLDSMITH
& HOADLEY,

Attorneys for Defendant.

And afterwards, towit, on the 19th day of October, A. D. 1907, an entry was made upon the Journal of the Court aforesaid, which said entry is clothed in the words and figures following, towit:

Entry Journal 9, Page 415.

Motion to Consolidate Granted and Cause Consolidated With Cause No. 1866.

This cause coming on this day to be heard upon the motion of the defendant to consolidate this case with case 1866 on the docket of this court between the same parties, was submitted to the court, upon

consideration whereof the said motion is granted. Wherefore it is ordered that this cause be and the same hereby is consolidated with cause No. 1866.

146 THE UNITED STATES OF AMERICA,
Southern District of Ohio, Western Division, ss:

I, Benjamin R. Cowen, Clerk of the District Court of the United States of America, within and for the District and Division aforesaid, do hereby certify that the foregoing are true and correct copies of the pleadings and entries in cases numbered 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884 and consolidated with case No. 1866, as the same appear of record and on file in the Clerk's Office of the Court aforesaid.

In witness whereof, I have hereunto set my hand and
[SEAL.] affixed the seal of said Court, at Cincinnati, Ohio, this 6th day of December, A. D. 1907.

B. R. COWEN, *Clerk.*

147 And afterwards, to-wit: on the 7th day of January, A. D., 1908, an entry was made on the journal of said court, clothed in the words and figures as follows, to-wit:

No. 1770.

UNITED STATES OF AMERICA
vs.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY

and

No. 1771.

UNITED STATES OF AMERICA
vs.

BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

These causes are argued together by Mr. Sherman T. McPherson for the United States and by Mr. Edward Colston for the Baltimore & Ohio Southwestern Railroad Company and are submitted to the court.

And afterwards, to-wit: on the 4th day of February, A. D., 1908, judgment was rendered in said cause, clothed in the words and figures as follows, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1770.

UNITED STATES OF AMERICA

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause be and the same is hereby reversed and the cause is remanded to the said Circuit Court with directions to enter a judgment in accordance with the opinion of this court.

148 And afterwards, to-wit: on the 4th day of February, A. D., 1908, judgment was rendered in said cause, clothed in the words and figures, as follows, to-wit:

United States Circuit Court of Appeals for the Sixth Circuit.

No. 1771.

UNITED STATES OF AMERICA

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY.

Error to the District Court of the United States for the Southern District of Ohio.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this cause be and the same is hereby reversed and the cause is remanded to the said Circuit Court with directions to enter a judgment in accordance with the opinion of this court.

And afterwards, to-wit: on the 19th day of February, A. D., 1908, an opinion was filed in said cause, clothed in the words and figures as follows, to-wit:

Nos. 1770 and 1771.

United States Circuit Court of Appeals, Sixth Circuit.

THE UNITED STATES OF AMERICA, Plaintiff in Error,
*vs.*THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.Error to the District Court of the United States for the Southern
District of Ohio.

Submitted January 7, 1908. Decided February 4, 1908.

Before Severens and Richards, Circuit Judges, and Knappen, Dis-
trict Judge.

SEVERENS, Circuit Judge, delivered the opinion of the court:

The two causes above entitled were heard together in this court, being alike in all essential particulars. They were two of twelve similar causes in which suits were brought by the United States to recover penalties for several violations by the defendant railroad company of an Act of Congress entitled "An Act to prevent cruelty to animals while in transit by railroad or other means of transportation" from one state to another, etc., passed June 29, 1906. The suits were all brought in the District Court of the United States for the

149 Southern District of Ohio, and each related to distinct shipments of cattle and swine made by different parties from stations of the railroad company in other states to various consignees at Cincinnati, Ohio. The petition in each case alleged a shipment over the defendant's road, from a station in another state than Ohio, by a party named, of the live stock therein described, to a certain consignee at Cincinnati; and then alleged that the time occupied in the transportation was more than 40 hours, in the first of the cases above entitled, 43 hours and 45 minutes, and in the second, 45 hours and 25 minutes, and further alleged that this transportation was made without unloading the said live stock for rest, water and feeding, or either; "and that said defendant knowingly and wilfully failed to unload the said live stock in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours; and further, that the said live stock, above described, were carried in a car in which they could not and did not have proper food, water, space and opportunity to rest."

The defendant by its answer admitted all the material allegations of the petition, but averred that the shipment mentioned in the petition "was forwarded to Cincinnati on a certain train of the defendant, known and designated as train No. 98; that on said train there were also loaded and forwarded certain other shipments of live stock to-wit," describing eleven other such shipments by various other consignors to consignees at Cincinnati, Ohio, from stations in other

states; and that in respect of each of those cases the railroad company had been in like default; and that eleven other suits brought by the United States, each for a penalty based on the same default were then pending in that court. Upon these facts the defendant claimed that but one offense had been committed and but one penalty incurred. On filing this answer the defendant moved that the several causes be consolidated, "in order that there may be a recovery of but one penalty for all the shipments." The court being of opinion that the statute dealt with the operation of trains by railroad companies, and not with the different shipments which the trains may carry, the motion was allowed. The District Attorney moved for a judgment for a penalty, separately, in each case "for the reason that each of said causes should be treated as a different cause of action, and a separate penalty assessed in each." This motion was overruled; and the plaintiff excepted to this ruling. The court thereupon entered the following judgment:

"The court, being fully advised in the premises, finds that the defendant herein admits its liability in this cause, and there-
150 fore doth hereby order and adjudge that said defendant pay to the plaintiff herein the sum of one hundred dollars and its costs herein expended, and in default of payment execution shall issue, and the court does order, adjudge and decree that the within foregoing order in cause number 1866, shall apply to, operate upon, and be conclusive of the right of the plaintiff to recover of the defendant in each of the following causes, to-wit: 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884."

The causes were properly consolidated. Section 921 of the Revised Statutes provides that "when causes of a like nature or relative to the same question are pending before a court of the United States," this may be done. Whether one judgment may be given for all or a separate judgment in each case will depend upon the special circumstances. If it is necessary to the due administration of the law and the protection of the rights of the parties that the integrity of the several causes shall be so far preserved as to secure the proper result in each case, to the end that the party aggrieved may not be embarrassed thereby in seeking relief against the judgment or for any other sufficient reason, the court will direct the proceedings accordingly. The statute is one for convenience in saving expense to the parties and the time of the court.

The validity of the Act of June 29, 1906, is not disputed; nor is the commission of the offense, or offenses, charged in the several petitions. The question presented on these writs of error relates to the penalty, and that depends upon the construction of the first section of the Act which reads as follows:

"Be it enacted, etc., That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing or other vessels carrying or transporting

cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which cannot be anticipated or avoided by the exercise of due diligence and foresight: Provided, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of the Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: Provided, That it shall not be required that sheep be unloaded in the night time, but where the time expires in the night time in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours."

151 The contention for the plaintiff is that this statute deals with separate shipments or consignments of live stock, and that it does not matter that more than one shipment is taken by a train; and therefore that several offenses may be committed in the transportation of a single train load. The defendant insists that the train load of live stock is the integer which the Statute contemplates as the objective thing to which the forbidden act relates and that therefore the offense is single, though there may be several shipments of stock in a train which may be affected by the same neglect.

It may be admitted that the Statute is not so clear upon this subject as would be desirable. The language is quite general and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the twenty-eight hour limitation may be extended to thirty-six hours "upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading" etc. It seems to us that this gives the key by which the meaning of the Act in this respect may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or if he could,

152 it would disable other shippers from exercising the right to have their stock unloaded for rest, and feeding and then go on. It is urged that it would be very inconvenient for the railroad company to dismember its trains by dropping out one or more cars at different stations and leaving them to be picked up by other trains which may or may not find it convenient to take them in. But the duty imposed by the Statute, however construed, is highly inconvenient, and it is a difference in degree merely. Besides we have little doubt that the company, having in mind the duty it would be under to comply with this requirement, would be able to so adjust its train service as to meet such contingencies without serious derangement. The argument based upon the supposed inconvenience to the railroad company does not impress us as being very persuasive, although if the matter were very doubtful it would deserve to have some weight.

The construction which we propose leads to the harmonious operation of the several provisions of the Statute more effectively than any other which has been suggested. And if, as no one doubts, the law is not void for uncertainty and should be given effect, our only duty is to ascertain what it means and execute it accordingly. The maxims and rules adopted for the purpose of interpreting the meaning of a statute require that we attend to all its provisions, and, if possible, attribute to the language in which each is expressed a meaning which will permit other provisions to have their due effect. This doctrine is so well settled that the rules by which it is formulated have become axiomatic. Two of them, *Ex antecedentibus et consequentibus fit optima interpretatio* and *Nadeitur a sociis*, are expounded in Broom's Legal Maxims at pages 555 and following. A good statement of the doctrine as applied to the case before us is contained in 26 A. & E. Encyl. of L. 616, 2d Ed., where it is said: "In construing a section of an Act, regard must first be had to the language of the clause itself and second to other clauses in the same Act, and that construction should be adopted which makes the whole act stand consistently together or reduces the inconsistency to the smallest possible limits." We add some of the cases in the Supreme Court in illustration.

Pennington v. Coxe, 2 Cr. 33, 52.

Alexander v. Alexandria, 5 Cr. 1, 7-8.

Market Co. v. Hoffman, 101 U. S. 112, 116, 117.

Kohlstaad v. Murphy, 96 U. S. 153, 159, 160.

Neal v. Clark, 95 U. S. 704, 709.

It is conceded that the Statute is penal and that it is not to be extended beyond the fair meaning of the language employed. But there is scant room for the application of that principle here. 153 for there is no term or language which needs to be strained or extended to similar conditions to reach a proposed conclusion, but simply a question as to the meaning of the language actually employed.

The Act of June 29, 1906, was enacted to take the place of the Act of March 3, 1873, carried into Sections 4386 to 4390 of the Re-

vised Statutes, which it repealed. The earlier law seems not to have been the source of much litigation. It was held by Judge Key at the circuit in *United States v. East Tennessee, Virg. etc. R. Co.* 13 Fed. 642, upon the limited construction which he gave to that Act, that it did not apply to the transportation of live stock from one station to another in the same state. And in *United States v. Boston & A. R. Co.*, 15 Fed. 209, it was held by Judge Nelson, also at the circuit, in a case where a large number of animals had been shipped, that the statute could not be fairly construed as making the unlawful confinement of a single animal a separate offence, and that the confinement of the entire number of animals was a single offense. It does not appear whether in that case there was more than one owner or more than one consignment. And that law did not contain the provision in the new law which allows the prolongation of the confinement of the animals upon the consent of the shipper. In *United States v. Louisville & N. R. Co.*, 18 Fed. 480, Judge Key held that the time during which a preceding carrier had kept the stock confined without unloading must be counted against the second carrier, but that the latter was not liable for the continued confinement by a subsequent carrier for a period which with the time of the confinement by the preceding carrier would extend beyond the prescribed 28 hours. In *Newport News & M. Val Co. v. United States*, 61 Fed. 488, it was held by this court that the carrier could not excuse itself upon the ground of the occurrence of an "accidental cause," where, as in that case, it was an accident on the road due to its own negligence. In *United States v. Harris*, 85 Fed. 533, it was held by the Circuit Court of Appeals for the Third Circuit that a receiver in charge of a railroad under an order of a court was not included in the Statute as one charged with the duty and so liable to the penalty, for the reason that only "railroad companies" were mentioned in that Act, a matter which is cured by the later Act; and the Supreme Court affirmed that ruling in the same case, 177 U. S. 395. In the case of *United States v. St. Louis & S. F. R. Co.*, 107 Fed. 870, it was held by Judge Rogers that upon the facts in that case, the unlawful confinement of all the animals on a certain train constituted by a single offense.

154 Those facts were that the train was made up of several cars each containing part of an entire shipment made by the same party to the same consignee. In that case, the judge came to that conclusion in the absence of the light given by the new law by the provision we have emphasized. However we think he was right though he reached his conclusion by lights more dim than are now available. We refer to these cases because they are cited. But they really give little or no assistance upon the particular question with which we have to deal.

For the reasons we have given, we conclude that the judgments should be reversed and further proceedings be had in the court below in accordance with this opinion.

And afterwards, to-wit: on March 3rd, 1908, a petition for rehearing was filed in said causes which reads and is as follows, to-wit:

Petition for Rehearing.

155 United States Circuit Court of Appeals for the Sixth Circuit.

Nos. 1770-1771.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.*Petition for Rehearing.*

The Baltimore & Ohio Southwestern Railroad Company comes now and asks for a rehearing of this case and for a dismissal of the petition in error of the United States upon the ground that this court had no jurisdiction to review the judgment of the District Court on appeal of the Government. The want of jurisdiction is due to the fact that the cases in the District Court from which the appeal
 156 by writ of error was taken to this court, though civil in form, are criminal in fact, and no provision has been made by Act of Congress enabling the United States to appeal a criminal case by a writ of error or otherwise from the District Court to the United States Circuit Court of Appeals.

That the case or cases in the District Court from which the writ of error in question was taken, being suits brought to collect penalties for violation of a statute, are criminal cases, although the remedy is in form of civil action, is well established by the decisions of the Supreme Court of the United States.

We call attention particularly to *Lees v. United States*, 150 U. S., 476. The third clause of the syllabus in that case reads as follows:

"An action to recover a penalty under that act" (the act referred to was an act prohibiting the importation and migration of foreigners and aliens under contract or agreement), "though in form a civil action, is unquestionably criminal in its nature, and the defendant can not be compelled to be a witness against himself."

In discussing the question, at p. 480 the Supreme Court said:

"A third allegation of error is that the court compelled one of the defendants to become a witness for the Government, and furnish evidence against himself. * * * This, although an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant can not be compelled to be a witness against himself. It is unnecessary to do more than refer to the case of *Boyd v. United States*, 116 U. S., 616. The question was fully and elaborately considered by Mr. Justice Bradley in the opinion delivered in that case."

157 We also call the attention of the court to the case of *Boyd v. United States* (*supra*.)

In the recent case of *United States v. Illinois Central R. R. Co.*, 156 Fed. Rep., page 182, Judge Evans had occasion, in construing the Safety Appliance Act, to determine whether statutes, of the class

to which the statute under consideration here belongs, are criminal statutes; and in a well-considered opinion he came to the conclusion that such statutes are criminal statutes (See that part of his opinion beginning on p. 184, last par., and p. 185.)

In *United States v. Louisville & Nashville R. Co.*, 156 Fed., 863, Judge Evans declared Sections 4386-4388, Revised Statutes of the United States, to which sections the present act of June, 1906, is an amendment, to be criminal statutes; and that in a proceeding to enforce the penalty, although the action is civil in form, the defendant is presumed innocent until every essential element of the offense is proved beyond a reasonable doubt.

For the *criteria* by which to determine whether a statute belongs to the class of criminal or civil statutes, we refer the court to the case of *Huntington v. Attrill*, 146 U. S., 657; particularly to that part of the opinion of Mr. Justice Gray that begins with the last paragraph on p. 668, wherein he states that the test whether a law is penal, is whether the wrong which it prevents or redresses is a wrong to the public, or is a wrong to the individual.

There is no question that this act for the prevention of cruelty to animals is a law intended to prevent a wrong to the public, because it is a law solely in the interest of humane treatment of the dumb brute. Its object was not to protect any right of ownership in cattle.

We also refer to *Wisconsin v. Pelican Insurance Co.*, 127 U. S., 265, particularly to Mr. Justice Gray's opinion at p. 299.

158 IN A CRIMINAL CASE THE UNITED STATES IS NOT AUTHORIZED TO TAKE AN APPEAL BY WRIT OF ERROR OR OTHERWISE.

In support of this proposition it is necessary to cite only the case of *United States v. Sanges*, 144 U. S., 310, where the syllabus is as follows:

"A writ of error does not lie in behalf of the United States in a criminal case."

The opinion is one of those elaborate results of the industry and intelligence of Mr. Justice Gray.

Inasmuch as the United States was not authorized by common law to take an appeal by writ of error or otherwise, that right could be conferred only by an act of Congress. We have been unable to find any act of Congress that confers it.

After the decision of Judge Humphreys in Chicago, in the Meat Packers' Case, it was found there was no right on the part of the United States to appeal from that judgment. Thereupon the President of the United States sent a message to Congress calling attention to the defect in the law. In consequence of which we find an act of Congress, passed March 2, 1907 (34 United States Statutes at Large, Chap. 2564, p. 1246), providing that writs of error may be taken on behalf of the United States to the Supreme Court in certain criminal cases. But that statute does not cover the present case.

We must apologize to the court for not having called attention to this subject at an earlier stage of the case. It was due to oversight and to the belief that the Government would not have ventured to take this appeal by writ of error unless it had known what it was about, which seems not to have been the case.

122 THE BALTIMORE & OHIO SOUTHWESTERN R. R. CO. VS.

159 We therefore ask that a rehearing be granted and the writ of error be dismissed.
Respectfully submitted,

HARMAN, COLSTON, GOLDSMITH
& HOADLY,

Attorneys for Defendant in Error.

I certify that the foregoing petition for rehearing is well founded.
EDWARD COLSTON, *Counsel.*

February 29, 1908.

160 And afterwards to wit on March 14th, 1908, an order denying said petition for rehearing was entered in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1770, #1771.

UNITED STATES OF AMERICA
vs.
BALTIMORE & OHIO SOUTHWESTERN RAILROAD CO.

The petition for rehearing filed in this cause is hereby denied.

And afterwards to wit on March 18th, 1908, a petition for allowance of writ of error and assignments of error were filed in said cause which are in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

Petition for Allowance of a Writ of Error and Assignment of Errors.

Comes now the Baltimore and Ohio Southwestern Railroad Company and prays the court for allowance of a writ of error from the Supreme Court of the United States, and makes the following assignments of error:

1. The United States Circuit Court of Appeals erred in deciding that the judgment and sentence of the District Court in case
161 No. 1866 in that court was not a bar to the claim of the United States to a penalty of not less than one hundred dollars and not exceeding five hundred dollars in each of the eleven other cases mentioned in the answer of The Baltimore and Ohio Southwestern Railroad Company in said case No. 1866, to wit: in cases Nos. 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878,

1879 and 1880, consolidated with said case No. 1866 and with each other.

2. Said Court of Appeals erred in deciding that the said judgment of the District Court in case No. 1866 in favor of the United States and against The Baltimore and Ohio Southwestern Railroad Company for the sum of one hundred dollars penalty under the statute in such cases made and provided was not conclusive of the right of the United States to recover of the defendant a penalty pursuant to said statute in each of said other cases consolidated with said case No. 1866 and with each other.

3. Said Court of Appeals erred in reversing so much of the judgment of the District Court in said case No. 1866 and in said other consolidated cases as holds that the judgment in said case No. 1866 is a bar to the claim of the United States for penalties in said other cases, and is conclusive against the right of the United States to recover any other penalty.

4. Said Court of Appeals erred in not affirming the judgment of the District Court in the above consolidated cases.

Wherefore The Baltimore & Ohio Southwestern Railroad Company prays that a writ of error be allowed from the Supreme Court of the United States to this court for the correction of the errors aforesaid.

EDWARD COLSTON,

*Attorney for the Baltimore & Ohio Southwestern
Railroad Company, Defendant in Error.*

162 The writ of error prayed for as above is hereby allowed, and it is ordered that the mandate from the Circuit Court of Appeals to the District Court be stayed until this writ of error is disposed of in the Supreme Court of the United States.

March 19, 1908.

HENRY F. SEVERENS,

*Presiding Judge of the United States Circuit
Court of Appeals for the Sixth Circuit in
Above Case.*

And afterwards to wit on March 20th, 1908, bond on writ of error was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1770.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO — RAILROAD COMPANY.

Know all men by these presents, That we, The Baltimore & Ohio Southwestern Railroad Company, as principal and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said United States of America: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of March, A. D. 1908.

Whereas, in certain causes depending in the District Court of the United States for the Southern District of Ohio, Western Division, wherein the United States of America was plaintiff and the Baltimore & Ohio Southwestern Railroad Company was defendant, which causes

163 were numbered on the docket of said District Court as follows: 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878, 1879, 1880, and which causes were consolidated in said court as one cause under No. 1866, a certain judgment was rendered against the United States in favor of said The Baltimore & Ohio Southwestern Railroad Company at the October Term A. D. 1907 of said District Court; and

Whereas, afterwards the United States did sue out a writ of error returnable to and in the United States Circuit Court of Appeals for the Sixth Circuit to reverse the said judgment so as aforesaid rendered by said District Court; and

Whereas, said United States Circuit Court of Appeals did reverse said judgment; and

Whereas, said The Baltimore & Ohio Southwestern Railroad Company has obtained a writ of error from and returnable to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit to reverse the said judgment of said last-named court in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said The Baltimore & Ohio Southwestern Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,

By C. C. F. BENT, *General Manager*.

Attest:

E. W. SHEER,

Assistant Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,

By W. S. DIGGS, *Resident Vice President*.

Attest:

E. P. MOORE,

[SEAL.] *Resident Ass't Secretary.*

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Approved by—

HENRY F. SEVERANS,

Cir. Judge, Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit in said case.

March 19, 1908. [

Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 15, 1908, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 18, 1907, for the purpose of nominating officers of the Company, * * * for the ensuing year beg leave to report as follows:

Place	Resident Vice Pres.	Resident Assist. Sec.
	A. B. Voorheis.....	W. S. Diggs
	J. G. Schmidlapp.....	John E. Bruce
Cincinnati, Ohio.....	H. C. Yergason.....	B. F. Higdon
	W. S. Diggs.....	E. P. Moore
	John E. Bruce	

* * * * *

"Whereupon it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended 165 by the Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK, *County of New York*, ss:

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have prepared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the

original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and seal of the Company at the City of New York, this Jan. 30, 1908.

[SEAL.]

F. J. PARRY,
Assistant Secretary.

166 And afterwards, to-wit: on the 26th day of March, A. D. 1908, an opinion on petition for rehearing was filed in said cause clothed in the words and figures as follows, to-wit:

Opinion on Petition for Rehearing.

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Nos. 1770-1771.

United States Circuit Court of Appeals, Sixth Circuit.

THE UNITED STATES OF AMERICA

v.

THE BALTIMORE & — SOUTHWESTERN RAILROAD COMPANY.

Error to the District Court of the United States for the Southern District of Ohio.

On Petition for Rehearing.

Decided March 14, 1908.

Before Severens and Richards, Circuit Judges, and Knappen,
District Judge.

SEVERENS, *Circuit Judge*, delivered the opinion of the court:

Since our opinion in these cases was filed, upon which we directed a reversal of the judgment, counsel for defendant in error, upon their attention being drawn to certain decisions of the Supreme Court of the United States, to which we shall presently refer, and conceiving that they militated against the right of the United States to remove these cases into this court by writ of error, moves for a rehearing to the end that the question of the jurisdiction of this court may be considered, and if found not to exist, that the writs of error be dismissed. No doubt, the objection is one which we ought to consider and act upon if presented at any time before we lose control of the cases. The objection is that these are criminal cases, and it is urged that a writ of error will not lie at the instance of the

Government in a criminal case. The second of these propositions can not be denied. The law was so settled in *United States v. Sanges*, 144 U. S. 310. But the question remains whether these are criminal cases within the meaning of that rule.

The petition in each case was for the recovery of a penalty and the actions are in the similitude of the common law action of debt, the form being simplified by the rules of code pleading. Section 4 of the Act of Congress upon which the actions are based provides, "That the penalty created by the preceding section shall be recovered by civil action in the name of the United States in the circuit or district court," etc. The contention that these are criminal cases and that therefore the United States can not have a writ of error is said to find support in the decisions of the Supreme Court in *Boyd v. United States*, 116 U. S. 616 and *Lees v. United States*, 150 U. S. 476. In both of these cases the court was considering the immunities secured to defendants by the constitutional provisions of the Fourth and Fifth Amendments in the *Boyd* case, and the Sixth Amendment in the *Lees* case. It was said that such actions were "criminal in their nature." And it was because of that similitude, that having regard to the principle and purpose of the constitutional provisions, the court held they should be applied. In the present case no such considerations apply. No right secured by the Constitution is affected. In cases not so affected the question would be whether the statute intends that the penalty shall be recovered only by conviction upon an indictment, or maybe recovered by a civil action. This distinction and the consequences are considered with attention by Mr. Justice Strong in *United States v. Claffin*, 97 U. S. 546. The subject under discussion was directly involved in the case of *United States v. Zucker*, 161 U. S. 475. That was a civil action brought by the United States to recover the value of certain Merchandise which it was claimed had been forfeited in consequence of the violation of the Customs Act. Upon the trial the Government offered in evidence a deposition taken in France. The defendant objected that he was entitled to be confronted by the witness because the action involved the commission of a criminal offense. The court below sustained the objection. But the Supreme Court upon a writ of error sued out by the United States held that this was error and reversed the judgment. Mr. Justice Harlan in delivering the opinion of the court canvassed the *Boyd* and the *Lees* cases and pointed out their inapplicability. It would seem that the *Zucker* case presented even better ground for the objection made by the defendant in that case than the ground for the objection here. Moreover, it is significant that in the *Zucker* case, the writ of error was sued out by the United States and the cause was entertained and decided on its merits. It seems hardly possible to think that if the court had regarded such an action as a criminal proceeding, it would have done otherwise than to have simply dismissed the writ of error on its own motion. So too in the *Claffin* case, *supra*, the writ of error was sued out by the United States and the cause was considered on its merits. The action of debt has long been used, and regarded as the appro-

priate remedy for the collection of penalties prescribed for the violation of statutes:

Atkeson v. Everett, Cowper, 383.

Stockwell v. United States, 13 Wal. 531.

Lebanon v. Alcott, 1 N. H. 339.

Garman v. Gamble, 10 Watts. Pa. 382.

Ordway v. Central Nat. Bank, 47 Md. 217.

Webster v. People, 14 Ill. 365.

One further observation; the rule that the Government may not have a writ of error is a rule of the common law, and not the subject of a constitutional guaranty. It is therefore subject to modification by the Legislature. Congress has provided in the present case that the remedy shall be by a civil action, and the fair import of its meaning would seem to be an action having the ordinary incidents of a civil action, among which is the right to have the judgment reviewed.

Petition denied.

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Writ of Error.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, between the United States and The Baltimore & Ohio Southwestern Railroad Company, a manifest error hath happened to the great damage of the said The Baltimore & Ohio Southwestern Railroad Company as by its complaint appears. We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the eighteenth day of April, A. D. 1908, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

171 Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23rd day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Circuit Court, Southn. Dist. of Ohio.]

B. E. DILLEY,

Clerk of the Circuit Court of the United States, S. D. O.

[Endorsed:] Filed Mar. 23 1908 Frank O. Loveland, Clerk.

172

*Citation.*UNITED STATES OF AMERICA, *ss.*:

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The Baltimore & Ohio Southwestern Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry F. Severens, Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit in said cause, this 19th day of March, A. D. nineteen hundred and eight.

HENRY F. SEVERENS,
*Cir. Judge, Presiding Judge of the United
States Circuit Court of Appeals for the
Sixth Circuit in Said Cause.*

I, Sherman T. McPherson, United States District Attorney for the Southern District of Ohio, hereby acknowledge receipt of the within citation this 27 day of March, A. D. 1908.

SHERMAN T. MCPHERSON,
*United States District Attorney for
the Southern District of Ohio.*

173 And on March 18th, 1908, a petition for allowance of writ of error and assignments of error were filed in said cause which are in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

THE UNITED STATES OF AMERICA, Plaintiff in Error,

vs.
THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
Defendant in Error.

*Petition for Allowance of a Writ of Error, and Assignment of
Errors.*

Comes now the Baltimore and Ohio Southwestern Railroad Company and prays the Court for allowance of a writ of error from the Supreme Court of the United States, and makes the following assignments of error:

1. The United States Circuit Court of Appeals erred in deciding

that the judgment and sentence of the District Court in case
174 No. 1866 in that court was not a bar to the claim of the
United States to a penalty of not less than one hundred dollars
and not exceeding five hundred dollars in each of the eleven
other cases mentioned in the answer of The Baltimore and Ohio
Southwestern Railroad Company in said case No. 1866, to-wit: in
cases Nos. 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878,
1879 and 1880, consolidated with said case No. 1866 and with each
other.

2. Said Court of Appeals erred in deciding that the said judgment
of the District Court in case No. 1866 in favor of the United States
and against The Baltimore and Ohio Southwestern Railroad Com-
pany for the sum of one hundred dollars penalty under the statute
in such cases made and provided was not conclusive of the right of
the United States to recover of the defendant a penalty pursuant to
said statute in each of said other cases consolidated with said case
No. 1866 and with each other.

3. Said Court of Appeals erred in reversing so much of the judg-
ment of the District Court in said case No. 1866 and in said other
consolidated cases as holds that the judgment in said case No. 1866
is a bar to the claim of the United States for penalties in said other
cases, and is conclusive against the right of the United States to re-
cover any other penalty.

4. Said Court of Appeals erred in not affirming the judgment of
the District Court in the above consolidated cases.

Wherefore The Baltimore & Ohio Southwestern Railroad Company
prays that a writ of error be allowed from the Supreme Court of the
United States to this court for the correction of the errors aforesaid.

EDWARD COLSTON,

*Attorney for the Baltimore & Ohio Southwestern
Railroad Company, Defendant in Error.*

175 The writ of error prayed for as above is hereby allowed,
and it is ordered that the mandate from the Circuit Court of
Appeals to the District Court be stayed until this writ of error is dis-
posed of in the Supreme Court of the United States.

March 19, 1908.

HENRY F. SEVERENS,

*Presiding Judge of the United States Cir-
cuit Court of Appeals for the Sixth Cir-
cuit in Above Case.*

And on March 20th, 1908, bond on writ of error was filed in said
cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#1771.

UNITED STATES OF AMERICA

vs.

BALTIMORE & OHIO — RAILROAD COMPANY.

Know all men by these presents, That we, The Baltimore & Ohio Southwestern Railroad Company, as principal and American Surety Company of New York, as surety, are held and firmly bound unto the United States of America in the sum of Two Hundred and Fifty Dollars (\$250.00), to be paid to the said United States of America: to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of March, A. D. 1908.

Whereas, in certain causes depending in the District Court of the United States for the Southern District of Ohio, Western Division, wherein the United States of America was plaintiff and the Baltimore & Ohio Southwestern Railroad Company was defendant, which causes were numbered on the docket of said District Court as follows: 1866,

1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1878, 1879, 176 1880, and which causes were consolidated in said court as one cause under No. 1866, a certain judgment was rendered against the United States in favor of said The Baltimore & Ohio Southwestern Railroad Company at the October Term A. D. 1907 of said District Court; and

Whereas, afterwards the United States did sue out a writ of error returnable to and in the United States Circuit Court of Appeals for the Sixth Circuit to reverse the said judgment so as aforesaid rendered by said District Court; and

Whereas, said United States Circuit Court of Appeals did reverse said judgment; and

Whereas, said The Baltimore & Ohio Southwestern Railroad Company has obtained a writ of error from and returnable to the Supreme Court of the United States and has filed a copy thereof in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit to reverse the said judgment of said last-named court in the aforesaid suit, and a citation directed to the said United States citing and admonishing it to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said The Baltimore & Ohio Southwestern Railroad Company shall prosecute said writ of error to effect, and answer all damages and costs

if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.]

THE BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY,
By C. C. F. BENT, *General Manager*.

Attest:

E. W. SHEER,
Assistant Secretary.

AMERICAN SURETY COMPANY OF
NEW YORK,
By W. S. DIGGS, *Resident Vice President*.

Attest:

E. P. MOORE,
[SEAL.] *Resident Ass't Secretary*.

177 Approved by—

HENRY F. SEVERANS,

*Cir. Judge, Presiding Judge of the
United States Circuit Court of Ap-
peals for the Sixth Circuit in Said
Case.*

March 19, 1908.

*Extract from the Record Book of the Board of Trustees of the
American Surety Company of New York.*

The first quarterly meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Wednesday, January 15, 1908, at 12 o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York.

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Wednesday, December 18, 1907, for the purpose of nominating officers of the Company, * * * for the ensuing year, beg leave to report as follows:

Place.	Resident Vice Pres.	Resident Assist. Sec.
Cincinnati, Ohio.....	A. B. Voorheis.....	W. S. Diggs
	J. G. Schmidlapp.....	John E. Bruce
	H. C. Yergason.....	B. F. Higdon
	W. S. Diggs.....	E. P. Moore
	John E. Bruce.	

* * * * *

"Whereupon, it was

"Resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present for the officers, members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, and Counsel, as recommended by the
178 Nominating Committee for the ensuing year; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year.

* * * * *

"The following resolution was adopted:

"Resolved, that the Resident Vice-Presidents be and they hereby are, and each of them is hereby authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK, *County of New York, ss:*

I, F. J. Parry, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company at the City of New York, this Jan. 30, 1902.

[SEAL.]

F. J. PARRY,
Assistant Secretary.

179

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the United States Circuit Court of Appeals for the Sixth Circuit, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, between the United States and The Baltimore & Ohio Southwestern Railroad Company, a manifest error hath happened to the great damage of the said The Baltimore & Ohio Southwestern Railroad Company as by its complaint appears. We being willing that the error, if any hath been, should be duly

corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington on the eighteenth day of April, A. D. 1908, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

180 Witness, the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 23rd day of March, in the year of our Lord one thousand nine hundred and eight.

[Seal of the Circuit Court, Southn. Dist. of Ohio.]

B. E. DILLEY,
Clerk of the Circuit Court of the United States, S. D. O.

[Endorsed:] Filed Mar. 23 1908 Frank O. Loveland, Clerk.

181

Citation.

UNITED STATES OF AMERICA, *vs.*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The Baltimore & Ohio Southwestern Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Henry F. Severens, Presiding Judge of the United States Circuit Court of Appeals for the Sixth Circuit in said cause, this 19th day of March, A. D. nineteen hundred and eight.

HENRY F. SEVERENS,
*Cir. Judge, Presiding Judge of the United
States Circuit Court of Appeals for the
Sixth Circuit in Said Cause.*

I, Sherman T. McPherson, United States District Attorney for the Southern District of Ohio, hereby acknowledge receipt of the within citation this 27th day of March, A. D. 1908.

SHERMAN T. MCPHERSON,
*United States District Attorney for the
Southern District of Ohio.*

182 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings together with the original writs of error filed March 23rd, 1908 and the citations in the cases of United States of America *vs.* Baltimore & Ohio Southwestern Railroad Company Nos. 1770 & 1771, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 2nd day of April A. D. 1908.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
*Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit.*

Endorsed on cover. File No. 21,106. U. S. circuit court appeals, 6th circuit. Term No. 342. The Baltimore & Ohio Southwestern Railroad Company, plaintiff in error, *vs.* The United States. File No. 21,107. Term No. 343. The Baltimore & Ohio Southwestern Railroad Company, plaintiff in error, *vs.* The United States. Filed April 13th, 1908. File Nos. 21,106 and 21,107.

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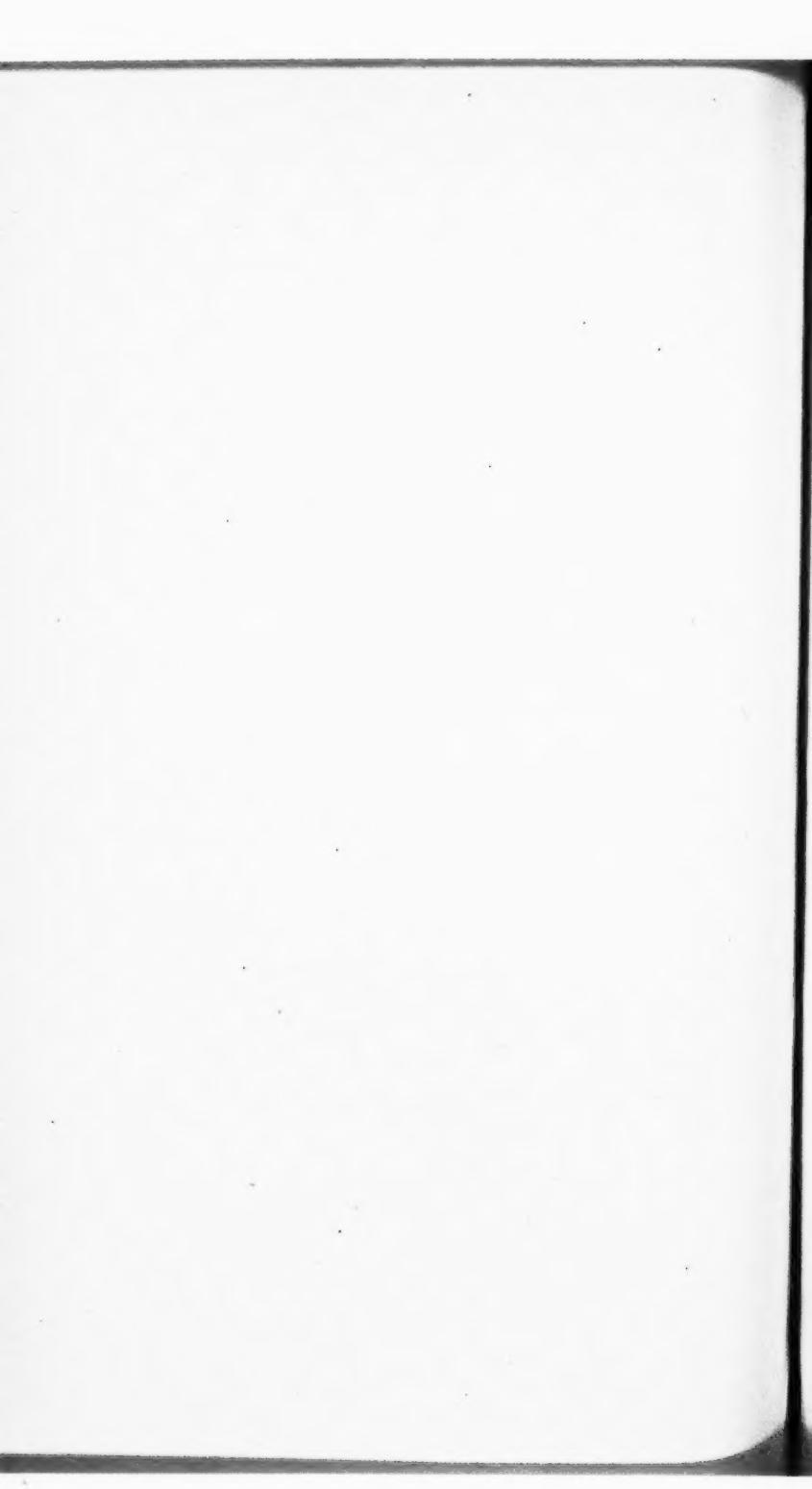
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THE UNITED STATES DEPARTMENT OF AGRICULTURE
BUREAU OF PLANT INDUSTRY
WASHINGTON, D. C.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,

Plaintiff in Error,

Nos. 703-704.

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Petition for Writ of Certiorari.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

In case this court should find that "the matter in controversy" does not "exceed one thousand dollars besides costs," the jurisdictional amount required by the last paragraph of Section 6 of the Court of Appeals Act (26 Stats. at Large, chap. 517, p. 826), we ask this court to take jurisdiction of this case by writ of *certiorari*, in

view of the importance attaching to a review of the decision of the Court of Appeals.

Your petitioner annexes a brief containing a statement of the case and the grounds for this petition, and refers to a copy of the record in the District Court printed under the supervision of the Circuit Court of Appeals, and a certified transcript of the proceedings in the Circuit Court of Appeals, including the opinion of that court, which are submitted herewith.

EDWARD COLSTON,
Counsel for Petitioner.

May 20th, 1908.

THE QUESTION OF LAW INVOLVED.

This case involves the important and interesting question, not heretofore decided by any Court of Appeals, arising on the construction of the act of Congress entitled "An act to prevent cruelty to animals while in transit," etc., passed June 29, 1906, whether a single fine is imposed by the act in case there be a train load of animals confined in cars without rest, food or water beyond the twenty-eight hours limit, or whether in such case there shall be *as many fines* imposed as there happen to be shipments of cattle carried on that train. To illustrate: The United States claims that if there are fifty shipments of horses on the same train from St. Louis to Cincinnati, and the horses are detained on the road beyond the twenty-eight hours, fifty penalties are incurred. But if it had happened that all those horses had been shipped by one man, as a single shipment, then there would have been but one penalty incurred.

This startling result was reached by the Circuit Court of Appeals for the Sixth Circuit, Judge Severens, Rich-

ards and Knappen sitting. That court reversed the District Court for the Southern District of Ohio, Western Division, which held in the case named that there was but one penalty.

STATEMENT OF CASE.

The United States brought eleven separate actions in the District Court of the United States for the Southern District of Ohio, Western Division, against the Baltimore & Ohio Southwestern Railroad Company, seeking in each action to recover a penalty of five hundred dollars for alleged violation of the act of Congress entitled "An act to prevent cruelty to animals while in transit," etc., passed June 29, 1906 (34 Stats. at Large, p. 607). Each of these actions was separately and serially numbered on the docket of the District Court beginning with No. 1866. The railroad company filed an answer in case No. 1866 and admitted that the cattle in that case had been delayed beyond the time allowed by the statute, and averred that that case was in respect of a shipment of cattle made by one Brooks, of Louisville, Illinois, consigned to a firm in Cincinnati, and that the shipment was carried on a certain train of defendant known as train No. 98. The answer further averred that on that *same* train all the other shipments of cattle referred to in the ten other cases above mentioned were carried. And the answer also admitted that the allegations in the respective petitions in those other cases, that the several respective shipments were confined in cars on its line of road more than twenty-eight hours without food, rest or water, were true. But the answer averred that the United States was entitled to recover only one penalty by reason thereof, not exceeding the sum of five hundred dollars. The railroad company then moved the

court to consolidate all the cases as one case under case No. 1866. The court consolidated the cases as one case. The court overruled the motion of the United States to assess a fine of five hundred dollars in respect of each shipment delayed on that train No. 98. The court then heard evidence offered by the railroad company showing circumstances in regard to the delay of the cattle, and held there was but one penalty incurred, and assessed the amount of the penalty at one hundred dollars and costs, for which it rendered judgment in favor of the United States. And the court further ordered that that judgment (\$100) should "apply and operate upon and be conclusive of the right of the plaintiff to recover of the defendant in each of the following cases, to-wit:" (Here followed an enumeration of the ten other cases). The United States assigned this action of the District Court for error in the Circuit Court of Appeals for the Sixth Circuit. That court reversed the judgment of the District Court and held, contrary to the opinion of the District Judge, that the proper construction of the statute required a separate penalty for each separate shipment, although all the shipments were on the same train and were subject to the same delay and the same failure to unload.

THE ACT OF CONGRESS.

The act of Congress under consideration provides, in substance, as follows:

Section 1. "That no railroad * * * whose road forms part of a line of road over which cattle * * * shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours with-

out unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding for a period of at least five consecutive hours, unless prevented by storm or by accidental or unavoidable causes which can not be anticipated or avoided by exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours."

Section 2 provides that—

"the feeding and watering of the animals shall be done by the owner or person having custody thereof, or, in case of his default in so doing, then by the railroad * * * transporting the same * * *, and such railroad shall have a lien upon the animals for food, care and custody furnished collectible at destination."

Section 3 provides that—

"any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

THE CONTENTION OF THE RAILROAD COMPANY.

The contention of the railroad company is that where a train load of stock is confined in cars for a period longer than twenty-eight consecutive hours without unloading for rest, water and feeding, such confinement amounts

to but *one offense*, and does not amount to as many separate offenses as there may happen to have been separate shipments on that train. The confinement of all the stock on the same train constitutes but one violation of the statute. It is that offense which subjects the carrier to the penalty. In such case the factor of offense is the train. In this case the stock was all moved in one train. Congress has not said in the statute whether the offense shall be per head of stock, per shipment, per car load, or per train load. If Congress had intended that there should be a fine imposed for each head of stock delayed, or for each shipment delayed, or for each car load delayed, it would have been easy to say so. Bearing in mind the rule of strict construction of penal statutes, the only proper construction of the statute is that the detention of all stock on the same train constitutes but one offense. This action although civil in form is criminal in fact. *Lees v. United States*, 150 U. S., p. 476.

DECISIONS UNDER OLD STATUTE.

On March 3, 1873, Congress passed an act entitled "An act to prevent Cruelty to Animals while in Transit by Railroad or other Means of Transportation within the United States" (Chap. CCLII., 17 Stats. at Large, p. 584). This act is now represented by Sections 4386-4390 Revised Statutes of the United States. Attention need be called to Sections 4386 and 4388 only. Those sections are as follows:

"SEC. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one State to another, or the owners or masters of steam, sailing, or other vessels carrying or transporting

cattle, sheep, swine, or other animals from one State to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated."

"SEC. 4388. Any company, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections, shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

These sections have been several times construed. Under these sections the Government first claimed that the penalties provided attached to each head of stock confined beyond the statutory period. And in the case of *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep., 209, the Government actually sued for penalties amounting to ten thousand dollars, being at the rate of one hundred dollars for each animal so confined. But the court, Nelson, J., held that a penalty of one hundred dollars for each animal was not the penalty imposed by the statute. The court said (p. 211 at bottom):

"The confinement of the entire number of animals for a period longer than twenty-eight consecutive hours, without unloading for rest, water and feeding, is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the unlawful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried."

The Government having failed to establish that the penalty shall be imposed per head, next made the claim that the penalty was per car load, and accordingly in the case of *United States v. St. Louis & S. F. R. R. Co.*, 107 Fed. Rep., 870, sued in ten counts, each count being for a car load, although all the car loads were in one train. The amount of penalties sought to be recovered was five hundred dollars for each car. On motion the Government was required either to consolidate all the counts or to elect one count on which to proceed so as to make but one offense. The court, after alluding to the case of *United States v. Boston & Albany R. R. Co.* (*supra*), said (p. 872):

"No reason can be assigned, in the opinion of the court, why the unlawful confinement of each car load of animals should be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of car loads shipped, which would not apply with equal force to the unlawful confinement of each animal. Manifestly if Congress had intended to impose upon a railroad company the maximum penalty of \$500 for each head of cattle that might be unlawfully confined upon one of its trains, it would not have left it to construction or inference; and it may be with equal propriety said that if Congress had intended to inflict so severe a penalty as \$500 for

each car load of cattle that might be unlawfully confined, it would not have left it to construction or inference. It was an easy matter for Congress to have said, if it had so intended, that the unlawful confinement of each animal or each car load of animals should constitute a separate offense. And in reference to a statute so highly penal as this the construction must be strict—equally as strict as if it were a statute creating a criminal offense. Nothing must be imported by construction into a penal statute which is not within its spirit and its letter.”

It is true that all the cattle belonged to the same person, but no importance was attached to that fact in the determination of the question.

THE PRESENT STATUTE.

The present statute is merely an amendment of Sections 4386 and 4388 referred to. The only material difference between the present statute and the old one consists in the following proviso in Section 1 of the present statute:

“Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours.”

The Government has seized hold of this proviso and makes the claim that it warrants a different construction from that placed upon the provisions of the old law; and it was upon the supposed effect of this proviso that the Court of Appeals rendered the decision that it did. That court said:

"It may be admitted that the statute is not so clear upon this subject as would be desirable. The language is quite general and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the twenty-eight hour limitation may be extended to thirty-six hours 'upon the written request of the owner or person in custody of the particular shipment, which written request shall be separate and apart from any printed bill of lading' etc. It seems to us that this gives the key by which the meaning of the act in this request may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment."

It is difficult to see how this provision furnishes any aid to the construction of this statute. The provision was not inserted for the purpose of increasing the penalty. The statute itself was not passed for the protection of private property in cattle, but was intended to protect the animals themselves for their own sake from a too long confinement. Whatever private injury would ensue from a too long confinement of the cattle, the shipper could redress by his remedy in an action against the carrier. The proviso was by way of concession to the shipper to enable him, if he so desired, to have his own stock carried on to destination, without unloading, where such destination could be reached within thirty-six hours.

That such was the sole purpose of this proviso is shown by the debates in the Senate that took place while the

passage of the present act was under consideration, if indeed it be not apparent otherwise. Those debates do in fact furnish a "key." (Congressional Record, Vol. 40, No. 187, p. 8564.)

The requirement in the proviso, that the request upon which the time of confinement could be extended to thirty-six hours "shall be separate and apart from any bill of lading, or other railroad form," was inserted to avoid such extension being claimed as the result of one of those printed clauses of the kind usually seen in a bill of lading to which the attention of the shipper, in the hurry of the moment, is hardly ever directed. Hence the mention of a bill of lading in the proviso. But the Court of Appeals seems to think that that reference to a bill of lading had some bearing upon the question of the penalty. But what bearing it has was not stated by the court and is not preceived.

THE DECISION OF THE COURT OF APPEALS INTERPOLATES
IN THE THIRD SECTION OF THE ACT (THE PENAL SEC-
TION) WORDS THAT ARE NOT THERE.

In effect the Court of Appeals construed the third section of the act by making the following interpolation, the latter being shown in large type:

"any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars [FOR EVERY SHIPMENT OF ANIMALS SO CONFINED CONTRARY TO THE PROVISIONS OF THIS ACT."]

The statement of the Court of Appeals in its opinion, that, "It may be admitted that the statute is not so clear

upon this subject as would be desirable," should have prevented that court from placing upon the statute the very liberal, if not strained construction which the court gave it, in order to multiply penalties.

A PENAL STATUTE MUST BE STRICTLY CONSTRUED.

This familiar doctrine is admirably stated by Chief Justice Marshall in *United States v. Wiltberger*, 5 Wheat., at p. 95. He there said:

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the Legislature, not the court, which is to define a crime, and ordain its punishment." [Italics ours.]

This principle of construction has been applied by this court in *United States v. Harris*, 177 U. S., 305, in construing the language of the old sections of this law (Sections 4386 and 4388). In that case this court held that the words of Section 4388 making any company, owner or custodian of such animals," etc., failing to comply with the provisions of the preceding sections liable to a penalty, did not include a receiver who was operating a railroad. The court said that admitting Congress intended to subject railroad receivers appointed by courts of the United States to those laws and regulations of the states and of the United States whose object was to promote safety, comfort and convenience of the public, yet it was not concerned with the general intention of Congress, but with its special intention, manifested in the

enactments under which the suit was brought. And further reasoning on the same line this court said:

“Can we fairly bring receivers within the penal clause by reasoning from a *supposed* or *an apparent* motive in Congress in passing the act?”

And the conclusion of the court was that the words “Any company, owner or *custodian* of such animals” did not include a railroad receiver who was transporting them over the line. (See pp. 308, 309.)

And in *Bolles v. Outing Company*, 175 U. S., 262, this court had under consideration the proper construction of certain penal provisions in the copyright law. At p. 265 this court said:

“If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial.”

It was no oversight on the part of Congress when it *failed* to provide that for a violation of the statute there should be a penalty of not less than one hundred nor more than five hundred dollars for *each shipment* of cattle confined beyond the limit allowed by statute.

ONE OFFENSE CAN NOT BE SPLIT INTO MANY AND
PENALTIES THEREBY MULTIPLIED.

This well established principle is sustained by the best authorities, such as *1 Bishop's New Criminal Law*, Section 793, p. 479. This author also states in Section 1061, Vol. 1, that, although the cases present contradictions quite irreconcilable, “yet it is reasonable to hold

that one act or even one transaction of feloniously taking and carrying away chattels constitutes, *within our constitutional guaranty*, but one offense. * * * *And since the averment of ownership is merely to indentify the things*, if they have different owners, all could as well be included in one count as though their identifying particulars differed in any other respect." And then speaking of the English decisions on the subject the learned author says that an English judge once ruled that where a man stole at one time two pigs belonging to the same person he might be convicted of the larceny of one pig, and afterwards of the larceny of the other. But the author dissents from that view and adds, as the American rule, that where the articles have all one owner the transaction can not "be cut up in this English fashion." He then pertinently adds—

"Even where there are divers owners, the same conclusion, it is believed, is the one better supported by our authorities, as certainly it is better in legal reason."

If in larceny cases averment of ownership will not multiply offenses, neither will they be multiplied in cases like this merely because a reference to shipments is made for another purpose in the proviso.

Other valuable authorities showing that offenses can not be split are:

Friedeborn v. Commonwealth, 113 Pa., at pp. 244-5.

Commonwealth v. Robinson, 126 Mass., at pp. 260, 262.

Hurst v. State, 86 Ala., p. 604.

Hoiles v. United States, 3 MacArthur, at p. 371.

Crepps v. Durden, 2 Cowper, 640, per Lord Mansfield.

State v. Commissioners of Fayetteville, 2 Mur-
phey (N. C.), 371.

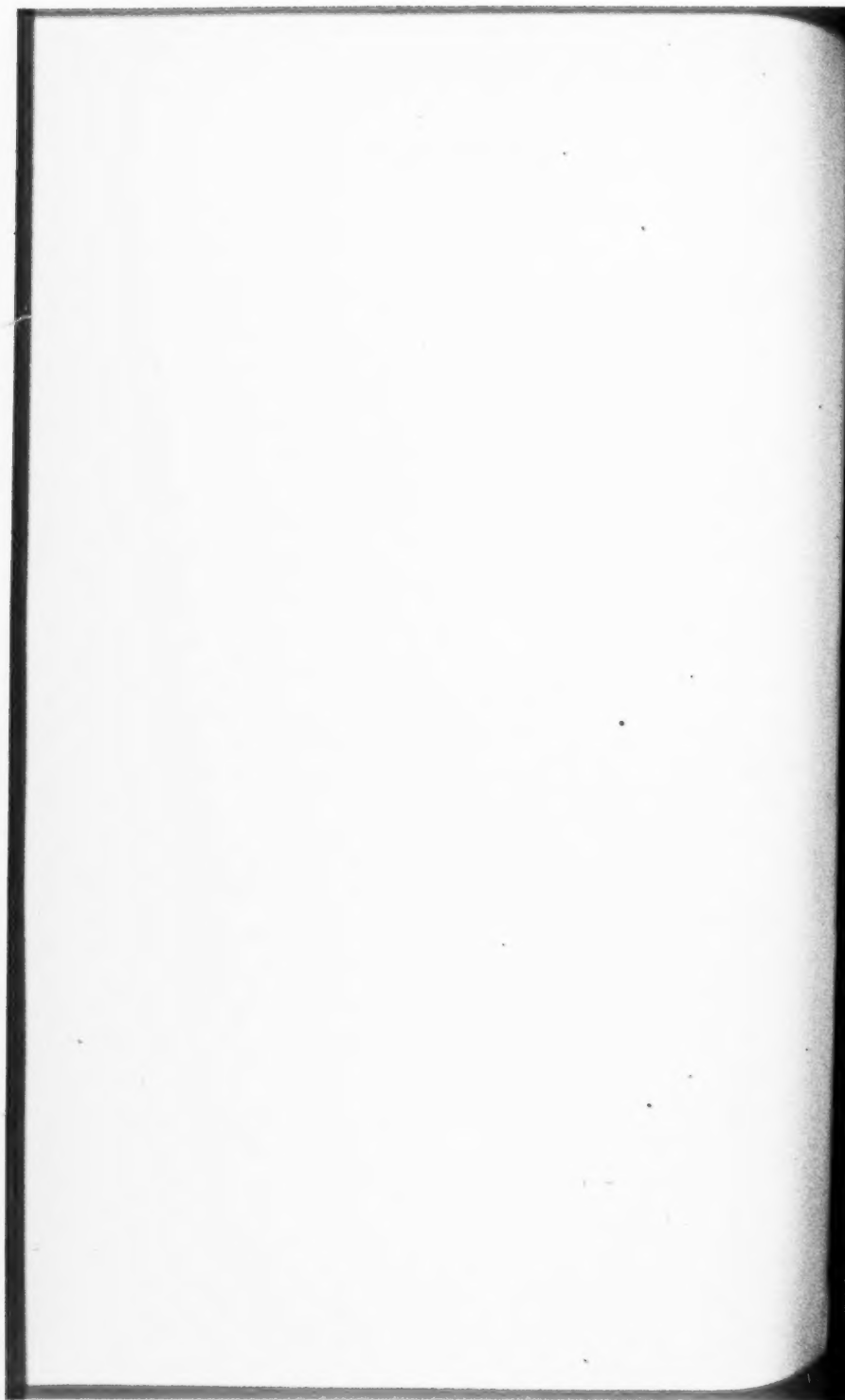
Nichols v. Commonwealth, 78 Ky., 178.

The question involved is constantly occurring and is of vast importance. The statute has never been construed by any court of Appeals, except in the present instance, and only twice by District Courts. In the District Courts the decisions were diametrically opposed.

Respectfully submitted,

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Of Counsel.



DEC 4 1878

DAVIS & BOWEN

No. 2000

Supreme Court of the United States

WASHINGTON, D.C.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY

Plaintiff in Error

THE UNITED STATES

Defendant in Error

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY

Plaintiff in Error

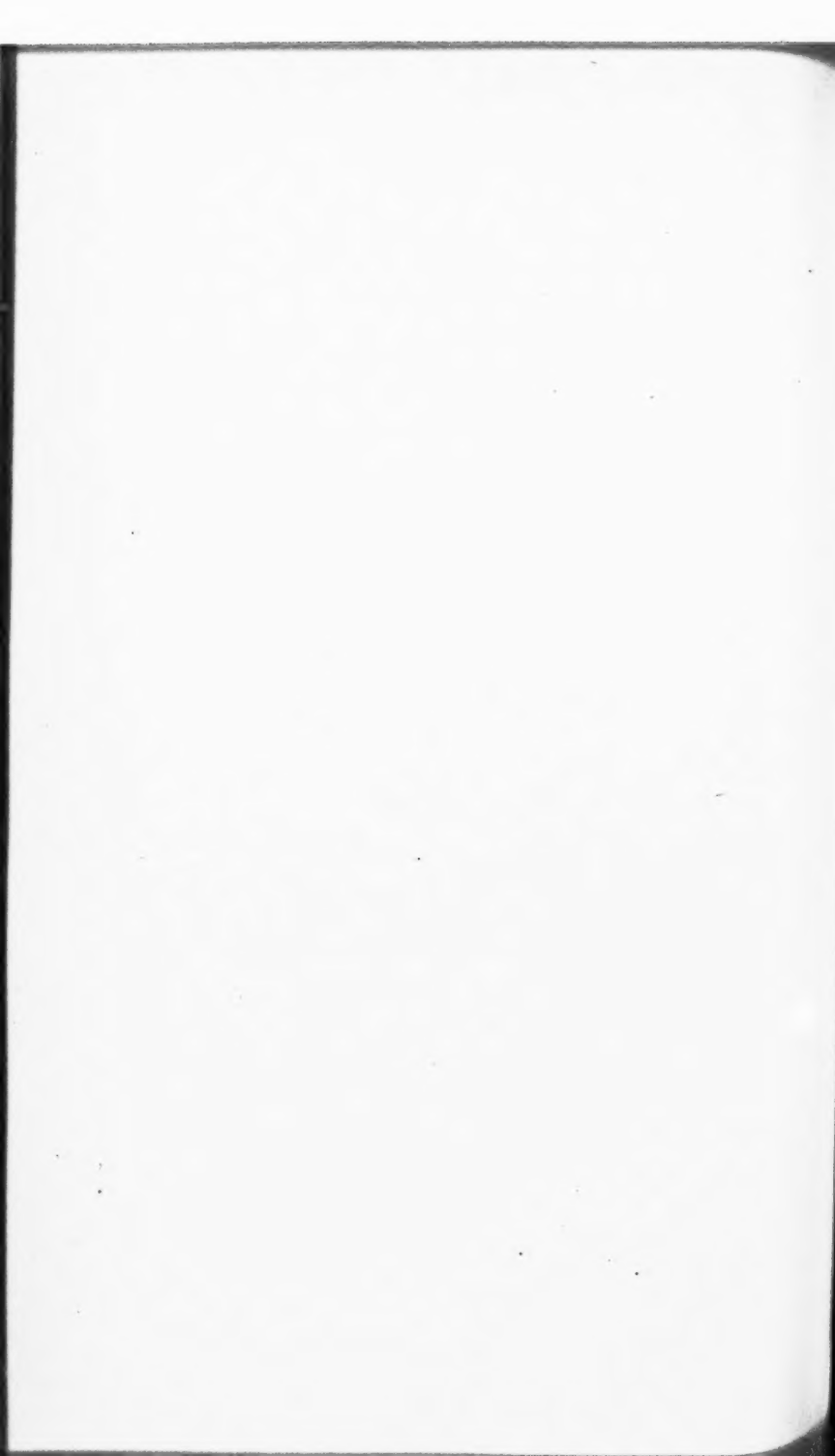
THE UNITED STATES

Defendant in Error

Writ of Habeas Corpus

Attorney for Plaintiff
A. W. GILLESPIE
Baltimore, Md.

Attorney for Defendant
JAMES H. BOWEN
Washington, D.C.



Supreme Court of the United States

OCTOBER TERM, 1909.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,

Plaintiff in Error,

No. 124.

vs.

THE UNITED STATES,

Defendant in Error.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,

Plaintiff in Error,

No. 125.

vs.

THE UNITED STATES,

Defendant in Error.

Brief for Plaintiff in Error.

STATEMENT OF CASE.

These cases, consolidated in the District Court as one case, come here by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit, under Section 6 of the Court of Appeals Act (26 Stats., 828). There was also filed in this court in due season a petition for allowance of a writ of *certiorari*.

The cases arose as follows:

On the same day, to-wit, March 22, 1907, the United States District Attorney for the Southern District of Ohio filed in the District Court of the United States, at Cincinnati, nine cases against the plaintiff in error, numbered on the docket of that court 1866 to 1874, both inclusive; and on April 12, 1907, he filed a tenth case against the plaintiff in error; and on May 3, 1907, an eleventh case against the plaintiff in error. The plaintiff in error was an interstate common carrier of live stock between Cincinnati and East St. Louis. In each of said cases the United States sought to recover a penalty of \$500 under the Act of Congress entitled "An act to prevent cruelty to animals while in transit," etc., passed June 29, 1906 (34 Stats. at Large, p. 607). A summary of the several live stock shipments in each petition is as follows:

Case No. 1866 was a shipment made February 2, 1907, in two cars, by J. A. Brook, from Louisville, Illinois, to Cincinnati (R., top p. 2).

Case No. 1867 was a shipment made February 2, 1907, in one car, by Shan Chapman, from Ridgeway, Illinois, to Cincinnati (R., top p. 16).

Case No. 1868 was a shipment made February 2, 1907, in two cars by Mason & Kemmer, from Louisville, Illinois, to Cincinnati (R., top p. 42).

Case No. 1869 was a shipment made February 2, 1907, by Walter Van Gilder, from Sumner, Illinois, to Cincinnati (R., top p. 50).

Case No. 1870 was a shipment made February 2, 1907, in four cars, by Wm. F. Harrell, from Omaha, Illinois, to Cincinnati.

Case No. 1871 was a shipment made February 2, 1907, in two cars, by Walter Van Gilder and Ber. McCane, from Sumner, Illinois, to Cincinnati (R., top p. 67).

Case No. 1872 was a shipment made February 2, 1907, in one car, by J. H. Brown, from Iola, Illinois, to Cincinnati (R., top p. 75).

Case No. 1873 was a shipment made February 2, 1907, in one car, by Brian, Shick & Co., from Sumner, Illinois, to Cincinnati (R., top p. 83).

Case No. 1874 was a shipment made February 2, 1907, in one car, by A. Louis Oder, from Olney, Illinois, to Cincinnati (R., top p. 91).

Case No. 1880 was a shipment made February 2, 1907, in three cars, by Shannon Bros. & Henry, from Noble, Illinois, to Cincinnati (R., top p. 99).

Case No. 1884 was a shipment made February 2, 1907, in three cars, by Chaffin & Knowles, from Clay City, Illinois, to Cincinnati (R., top p. 107).

In each suit it was alleged by the United States that the live stock had been confined on the cars in which they were carried, without unloading, beyond the statutory limit.

The plaintiff in error filed a separate answer in each of said cases, the answer in each case being the same, *mutatis mutandis*. The answer (R., top p. 5) admitted the shipment of the live stock and its detention beyond the statutory time, and then averred that the cars containing the live stock mentioned in the several suits *composed a single train of cars, to-wit, train No. 98*; that said live stock was transported from the several points of shipment to destination in a *single train of cars*, and were all, while being thus transported in the *same*

train, confined therein beyond the statutory period. The plaintiff in error further averred in said answers that it was guilty of but one offense, and was liable for but one penalty, not exceeding \$500 in amount, which penalty, as the same might be assessed by a court or jury, it averred its willingness to pay; and pleaded the foregoing in bar to any further recovery.

The plaintiff in error subsequently moved the court to consolidate each case with said case No. 1866 (R., top p. 8); and the United States, at the same time, moved the court for a separate judgment in each of the several cases "for the reason that each of said cases should be treated as a different *cause of action* and a separate penalty assessed in each" (R., top p. 9). These motions were argued, and the District Court disposed of them by sustaining the motion to consolidate and overruling the motion of the United States for the assessment of a separate penalty in each case (R., top pp. 9, 10). See entries of consolidation at top pages 32-34 of Record. And afterwards, having heard the evidence as to the reasons for the detention of the live stock beyond the statutory period, for the purpose of fixing the amount of the fine, the court ordered and adjudged the plaintiff in error to pay the sum of \$100 and costs, and that the payment of said amount should be a bar to the right of the United States to recover from the plaintiff in error any penalty in the other cases (R., top p. 10). The United States prosecuted error to the Court of Appeals to reverse the judgment of the District Court consolidating the cases and also its judgment ordering that the payment of one penalty in the sum of \$100 should operate as a bar to the recovery of any further amount by reason of delay of live stock on train 98. The assignments of error were that the court erred in

consolidating the cases, and in holding there was but one offense and but one penalty (R., top pp. 11, 12), and in refusing to render a separate judgment for a separate penalty in each case.

Attention is called to the fact that the United States at no time denied in the Court of Appeals that there was a consolidation of all the cases as one case under No. 1866. But the United States District Attorney docketed his petitions in error in the Court of Appeals, perhaps for motives of convenience, as being in case No. 1866 and in case No. 1867. But the record and proceedings of all the cases were sent to the Court of Appeals with those writs of error and are brought here. The Court of Appeals in its opinion held that the cases were properly consolidated under Section 921, Revised Statutes of the United States (R., top p. 116); but reversed the judgment of the District Court in so far as it had held that there was but one offense committed and one penalty incurred. The Court of Appeals remanded the case or cases with directions to enter judgment therein in accordance with its opinion (R., top p. 114). A petition for rehearing was filed in the United States Court of Appeals by this plaintiff in error denying the jurisdiction of that court, on the ground that the case was a criminal case from which the United States had no right to prosecute error, relying upon *United States v. Sanges*, 144 U. S., 310 (R., top p. 120). But the Court of Appeals held that the case was a civil case and not a criminal case, and overruled the petition (R., top p. 126). We presume the question is put at rest by the recent case of *Hepner v. U. S.*, 213 U. S., 103.

Plaintiff in error has also filed here a petition for *certiorari*, which it will submit with the argument of this case upon the present writ or error.

ARGUMENT.

It will have been observed that all the live stock constituting the shipments were transported on one and the same train of cars; and that the confinement of the stock without unloading for rest, food or water beyond the statutory period was the same as to all the animals and occurred at one time and as the result of one act or omission. Such are the undisputed facts of the case; the result from which is, as we insist, that there was but *one* offense, for which but *one* penalty could be assessed, and that the defense of *autre fois convict* made by defendant below should have been respected. Our insistence is well expressed by the District Judge in the memorandum opinion filed in this case (R., top pp. 23, 24). He said:

“Here the train carried distinct shipments and the railroad company was necessarily compelled to deal with them as such in every respect BUT ONE, *namely, the unloading of the animals for rest, feed and water.* The company could not, without violating the law, unload some of the shipments to the exclusion of the others, *nor extend the time of confinement of some of them without the written consent of all.* The law requires the railroad company to stop its trains carrying animals, once every twenty-eight hours and unload the animals for rest, food and water, and imposes a penalty for the failure to do so. *It deals with the operation of these trains, not with the different shipments which the trains may carry.*” [Italics ours.]

The present Act of Congress (See Appendix) provides, in substance, as follows:

"Section 1. That no railroad * * * whose road forms part of a line of road over which cattle * * * shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same *in a humane manner*, into properly equipped pens, for rest, water and feeding for a period of at least *five consecutive hours*, unless prevented by storm or by accidental or unavoidable causes which can not be anticipated or avoided by exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours."

Section 2 provides that—

"the feeding and watering of the animals shall be done by the owner or person having custody thereof, or, in case of his default in so doing, then by the railroad * * * transporting the same * * *, and such railroad shall have a lien upon the animals for food, care and custody furnished collectible at destination."

Section 3 provides that—

"any railroad * * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

The Government's claim is that if there be fifty head of horses, each horse belonging to a different shipper and

consigned to a different consignee, shipped on the same train and they be detained beyond the statutory time, there should be fifty penalties because each horse constitutes a separate shipment; but that if all of the horses belong to the same person and be shipped to the same consignee by the same train, there would be but one penalty.

The railroad company claims that the detention of the live stock aboard a train constitutes but one offense or infraction of the law. The factor of offense is the train. Live stock is moved in trains. It is not moved per separate shipment, nor per car, but per train. If there be a confinement in cars beyond the twenty-eight hours during transit under circumstances which constitute a violation of the statute, it must be the fault of the train. In such case the train is the offender. Congress has not said in the statute whether the offense shall be per head of stock, per shipment, per car load, or per train load. If Congress had intended there should be a fine of five hundred dollars for each head of stock delayed, or for each shipment delayed, or for each car load delayed, it was easy to say so. Bearing in mind the rule of strict interpretation of penal statutes, the only reasonable construction of the statute is that the detention of all stock on the same train constitutes but one offense.

Under the old statute (Sections 4386, 4388) the Government claimed that the penalty attached to each head of stock. And in the case of *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep., 209, the Government actually sued for penalties amounting to ten thousand dollars, being at the rate of one hundred dollars for each animal so confined. But the court, Nelson, J., held that a penalty of one hundred dollars for each animal was

not the penalty imposed by the statute. The court said (p. 211 at bottom):

"The confinement of the entire number of animals for a longer period than twenty-eight consecutive hours, without unloading for rest, water and feeding, is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the unlawful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried." [Italics ours.]

In *United States v. St. Louis & S. F. R. R. Co.*, 107 Fed. Rep., 870, the action was for penalties for confining cattle in transit beyond the limit allowed. There were ten counts in the declaration. Each count represented a carload, although all the carloads were in one train. The amount of penalty sought to be recovered was \$500 for each car. *The cattle belonged to the same owner.* On a motion to require the Government either to consolidate all the counts or to elect one count on which to proceed so as to make but one offense, it was held that the motion should be granted. The court, after alluding to the case of *United States v. Boston & Albany R. R. Co.* (*supra*), said (p. 872):

"No reason can be assigned, in the opinion of the court, why the unlawful confinement of each car load of animals should be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of car loads shipped, which would not apply with equal force to the unlawful confinement of each animal. Manifestly, if Congress had intended to impose upon a railroad company the maximum penalty of \$500 for each head of cattle that might be unlaw-

fully confined upon one of its trains, it would not have left it to construction or inference; and it may be with equal propriety said that if Congress had intended to inflict so severe a penalty as \$500 for each car load of cattle that might be unlawfully confined, it would not have left it to construction or inference. It was an easy matter for Congress to have said, if it had so intended, that the unlawful confinement of each animal or each car load of animals should constitute a separate offense. And in reference to a statute so highly penal as this the construction must be strict—equally as strict as if it were a statute creating a criminal offense. Nothing must be imported by construction into a penal statute which is not within its spirit and its letter.”

The only difference between that case and the present case lies in the fact that all the cattle belonged to the same person; whereas here they belonged to different persons and were consigned to different consignees. But we can not see why that fact should make any difference upon the question whether one offense or more than one offense has been committed.

At the time the act was put in its present form there were these two decisions relative to the application of the penalty clause which was the same in the old act (Sec. 4388, Rev. Stats.), as in the new or amended act (Sec. 3). Congress was cognizant of these two decisions; but made no change in the penalty clause. Congress knew that the law had been interpreted in these two decisions to mean that the confinement of a number of cattle on the same train was a single offense. Nevertheless Congress made no change regarding the matter of assessment of the penalty. The change in the new law that we are now

concerned with is in Section 1 (pp. 607-608, 34 Stats. at Large). It was introduced as a proviso, and is in the following words:

“Provided, that upon the written request of the owner or person in custody of the particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours.”

The time of confinement without unloading for food, rest and water allowed by the old statute was twenty-eight hours, and this proviso extended that period to thirty-six hours upon written request of the owner or person in custody of a shipment. Of course the owner or person in custody of one shipment could not make request for prolongation of confinement of live stock that he did not own or control. Hence the necessity of limiting the proviso to the particular shipment owned or controlled by the person making the written request. But that was its sole purpose. It reflects nothing whatever upon the matter of how the penalty should be assessed. The purpose of the changes made by the amendment of June 29, 1906, the present law, are fully set forth by the Secretary of Agriculture, at whose instance the amendment was introduced in Congress. While the amendment was before the Congress the Secretary of Agriculture addressed a communication to the Chairman of the Senate Committee having the matter under consideration, in which he set forth the reason for making the changes. (See p. 3774 Congressional Record, Senate, 59th Congress, First Session.) After enumerating certain reasons not important to the present controversy, the Honorable Secretary said:

"In the present bill it is purposed that the time during which animals may be confined by the carrier without food, rest or water shall remain at twenty-eight hours, the time provided in the present law with the exception that upon the written request of the owner or person in custody of the shipment, the time may be extended to thirty-six hours. It frequently happens that the twenty-eight hour limit has expired when the shipment was within a few hours of the destination, and if the law is made sufficiently elastic to enable the shipper to control this matter, it is thought that less suffering will result to the livestock in transit. It is the opinion of the best informed owners and shippers of livestock that when livestock can be carried to market within thirty-six hours, it is better and more humane to allow them to go through without unloading than to unload at the end of twenty-eight hours. Based upon careful observation of the workings of the law, the treatment of the livestock to the advantage of the shippers and owners thereof, it is the opinion of the Department of Agriculture that if certain other amendments to the present law, which are incorporated in the bill now in discussion, shall be adopted, the time during which the livestock may be confined in cars without food, rest or water may be extended from twenty-eight hours to thirty-six hours without disadvantage to the livestock. The great western markets are Chicago, East St. Louis and the Missouri River towns. The ranges and food lots are so located that if the railroads give the shippers anything like reasonable service with the thirty-six hour limit, by far the larger proportion of the livestock can be transported to market within thirty-six hours, and this will obviate the necessity for unloading the greater part of the

stock. With the thirty-six hour limit it will not be necessary to unload live stock from any locality more than twice."

There was a very interesting debate in the Senate at the time the amendments embodied in the present statute were adopted. (See Congressional Record, Senate, 59th Congress, pp. 3766-75, 8310-28.) That debate discloses no intimation of any purpose to change the penalty provision in any respect whatever.

The learned judge who wrote the opinion of the Court of Appeals, speaking of this proviso of the statute, however, said (R., top p. 117, last par.):

"It may be admitted that the statute is not so clear upon this subject as would be desirable. The language is quite general and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the twenty-eight hour limitation may be extended to thirty-six hours 'upon the written request of the owner or person in custody of the particular shipment, which written request shall be separate and apart from any printed bill of lading,' etc. It seems to us this gives the key by which the meaning of the act in this respect may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was one of several; or if he could, it would disable other shippers from exercising the right to have

their stock unloaded for rest and feeding, and then go on. It is urged that it would be very inconvenient for the railroad company to dismember its trains by dropping out one or more cars at different stations and leaving them to be picked up by other trains which may or may not find it convenient to take them in."

We are utterly unable to appreciate the force of this reasoning as to the effect of the proviso in question. We can not see that it gives any clue whatever to the meaning by which the act may be interpreted. Evidently there are shippers who consider thirty-six hours not too long a period to confine cattle without unloading if they could reach destination in that number of hours, and the carrier was by the proviso permitted to prolong the transportation of their cattle during thirty-six hours, upon written request. But as to shippers not making such request, the law remained as before. A request for the prolongation of the time as to some cattle would not affect other cattle as to which no such request was made. If there were in the same train a carload or a shipment of thirty-six hour cattle and a carload or shipment of twenty-eight hour cattle, the twenty-eight hour cattle would have to be unloaded at the expiration of that time for five hours rest, and the train would go on; or else the prolongation would have to be disregarded. It seems to us that the result of this proviso, if it has any bearing on the question, tends to make the train or car rather than the shipment the factor. As the twenty-eight hour cattle could not with convenience be transported in the same train with thirty-six hour cattle, the proviso has the reverse effect from that given it by the Court of Appeals. Suppose there are twelve horses each belonging to a different owner, shipped from the same origin to the

same destination; and that as to six of the horses the time is twenty-eight hours and as to the others it is thirty-six hours. It would seem that the twenty-eight hour horses would have to be put in a car to themselves to be dropped off on expiration of twenty-eight hours; and the other horses in the other car be carried on. These are results from the proviso. But no result that we can deduce from it affords reason for treating each shipment as a unit of offense. There is no disclosure of a purpose on the part of Congress to multiply penalties when it adopted the proviso; and we think that the argument of the Court of Appeals is utterly untenable, and that its decision was legislative.

II.

Every Principle of Interpretation of Statutes is Against the Conclusion Reached by the Court of Appeals.

This court has been emphatic in holding that a penal statute should be strictly construed.

In the case of *United States v. Wiltberger*, 5 Wheat., at p. 95, Chief Justice Marshall, delivering the opinion of the court, said:

“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the Legislature, not the court, which is to define a crime, and ordain its punishment.”

In the present case, Congress has defined the offense and ordained the punishment. In ordaining the punishment Congress has not said that there shall be a fine for each shipment of stock, which is the Government's present contention. And therefore this court has no right *by construction* to inflict a punishment which the Legislature did not prescribe.

Bolles v. Outing Company, 175 U. S., 262, was an action to recover penalties under a section of the Revised Statutes for printing a copyrighted photograph of the yacht "Vigilant." The copyright law provided that if any person, after the recording of the title of any map, chart, musical composition * * * or photograph, should, without the consent of the proprietor of the copyright first obtained in writing, print, publish, or sell any copy of such map or other article, he should forfeit to the proprietor all the plates on which the same were copied, and should forfeit one dollar for every sheet of the copy *found in his possession*. A photograph of the yacht "Vigilant" under full sail had been copyrighted under the title "Vigilant No. 4." A copy of this photograph was made and published in the magazine known as "The Outing." On the trial of the case proof was offered as to the number of copies that *had been* in the defendant's possession at any time within two years next preceding the commencement of the suit. To this the defendant objected, claiming that proof could be offered only of the number of copies found in his possession at the time of the seizure, not the number that might be traced as having been in his possession during the period of two years. The defendant's contention was sustained by this court as being the proper construction of the statute. The court said (p. 265):

"The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the Legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; *if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial.*" [Italics ours.]

And at p. 268 the court further said:

"Had Congress designed the extended meaning claimed for these words 'found in his possession,' it would naturally have used the expression 'found or traced to his possession,' or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

And we may say in the present case that had Congress designed to inflict a penalty for each shipment of stock detained in transportation beyond twenty-eight hours, it would not have left that matter in doubt.

In *United States v. Harris*, 177 U. S., 305, it was held, on the principle of strict construction, that a receiver operating a railroad was not within the purview of the old statute (Sections 4386 and 4388, etc.) on the subject of not confining cattle in transportation beyond the limit of twenty-eight consecutive hours without feeding and watering. The language of Section 4388 was:

"Any company, owner or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding acts, shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

This was held not to apply to a receiver who was operating a railroad. The contention of the Government in that case is thus stated by the court (p. 308):

“Upon the whole, the proposition of the Government’s counsel is that the words ‘any company, owner or custodian of such animals,’ used in Section 4388, are intended to cover all those who can possibly violate the preceding two sections; that the words ‘every company’ must, therefore, be held to include a railroad company, whether a person, a partnership or a corporation, and whether acting individually, or through officers or receivers.”

And then the court proceeds:

“It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a *supposed or an apparent* motive in Congress in passing the act?”

And the court held that having regard for the rules of proper construction this statute could not be interpreted to cover the case of a receiver. The court further used this pertinent language:

“It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the Legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.” (p. 309.)

No more can it be said that it was an oversight or inadvertence that Congress did not attach a penalty to each shipment, or car load or head of stock. Congress knew that cars in which cattle are transported over lines of railroad either compose an entire train, or a part of a train; that cattle are not as a rule transported by the single car, nor by the single shipment. And if Congress had intended that a penalty should attach to the movement of each separate shipment or of each separate car load, it would have so provided.

In *Werckmeister v. American Tobacco Co.*, 207 U. S., 381, this court said:

“This section of the statute is penal, and there should be *especial care* to work no extension of its provisions by construction.” [Italics ours.]

The aim of this statute was not to protect ownership of cattle. There was ample law for that purpose already in existence in the states. The only purpose of the law was to protect the animals themselves from too long confinement without unloading for food, rest and water; and the violation of the statute would ensue when cattle are confined beyond the restricted period regardless of their ownership or of the number of shipments.

We think it should be assumed, in view of the letter of the Secretary of Agriculture, the debates in the Senate,

the changes made, and the decisions construing the penalty clause, that Congress intended that the construction placed upon the penalty section should remain unchanged, and that the penalty was not intended to be multiplied by the numbers of the shipments.

The principle that where words in a statute have acquired a well understood meaning through judicial or departmental interpretation it is presumed they were used in that sense in a subsequent statute on the same subject (*Mason v. Fearson*, 9 How., at p. 258, bot. par.; 200 U. S., 401, bot. par; 209 U. S., 339 at bot.) is applicable here. In the last case (200 U. S., 401) this language is used:

“We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed when not plainly erroneous, must be treated as read into the statute.”

III.

One Offense Can Not be Split Into Many, and Penalties Thereby Multiplied.

In I Bishop's New Criminal Law, Section 793, p. 479, it is said:

“It is often a nice question whether or not a transaction is separable into more crimes than one, and what crimes.”

The author then illustrates as follows:

“A man may violate the prohibiting statute by ‘exercising his ordinary calling’ in a single act. Thereupon if he continues to perform like acts throughout the day does he commit more offenses than one? The judicial answer to this question is that he does not. For further example a statute provides ‘a fine for performing any worldly employment or business’ on Sunday, and it was held that a person who keeps open his shop and makes successive sales to different persons throughout the same day subjects himself to but one fine.”

In regard to the larceny of chattels the same author (Section 1061, Vol. 1) says:

“The cases present contradictions quite irreconcilable. It would be reasonable to hold that one act or even one transaction of feloniously taking and carrying away chattels constitutes, within our constitutional guaranty, but one offense. * * * *And since the averment of ownership is merely to identify the things, if they have different owners, all could as well be included in one count as though their identifying particulars differed in any other respects.*”
[Italics ours.]

Then speaking of the English decisions on the point the author says:

“An English judge once ruled that where a man stole at one time two pigs belonging to the same person he might be convicted of the larceny of one pig, and afterwards of the larceny of the other.”

And the author adds:

“If the pigs had different owners, there would be American authority the same way. But where the articles have all one owner the authorities are pretty distinct that the transaction can not be cut up in this English fashion. Even where there are divers owners, the same conclusion, it is believed, is the one better supported by our authorities, as certainly it is better in legal reason.”

It is important to bear in mind that, in a criminal case no significance attaches to ownership except as it is a matter of identification of the property, although, of course, it is different where the suit is a civil action to recover for injury to property. This is forcibly put in the case of *Nichols v. Commonwealth*, 78 Ky., 178, where a party was indicted for the larceny of twenty-one chickens and seven geese, the personal property of Mrs. John Thorns, Larkin Grigsby, and Eli Brooks. It turned out upon the evidence that the portions of the property owned by Mrs. Thorns and Grigsby were taken from the same place; but that such of it as belonged to Brooks was taken from a place at least 200 yards from the place from which the others were taken, but upon the same plantation. It was all stolen the same night and brought from the country into the city of Lexington.

The court refused to charge the jury that in fixing the value of the property found to have been stolen, in order to ascertain the grade of the offense, they should not add together the value of the different parcels so found to have been taken from different places; and this was assigned for error. In disposing of that branch of the case the court said (p. 181 at bottom):

"Larceny is an offense against the public, and the offense is the same whether the property stolen belongs to one person or to several jointly, or to several persons, each owning distinct parcels. If a flock of sheep of which A owns five, B five and C five be feloniously asported by one and the same act, there are three trespasses but only one larceny. Each proprietor of a portion of the stolen sheep has sustained a civil injury, and may, indeed must, sue separately for the wrong suffered by him; but the public has sustained but one wrong, and can not maintain more than one prosecution, and if it attempt to do so, the judgment in the case first tried may be pleaded in bar of the remaining prosecutions."

But inasmuch as the property of Brooks had been taken from a place 200 yards from the place where the property of Mrs. Thorns and of Grigsby was taken, it was held that they were distinct larcenies and separate offenses and the case was reversed for that reason. A conclusion reached not because of different ownerships but because of the different places where the theft was committed.

Applying this principle to the case at bar, we claim that the entire train is but one place for the purpose of transportation, and that consequently there is but a single offense when all the cattle are confined in the same place beyond the limit allowed by law, and that the question of ownership cuts no figure. Some stress is placed by the Government upon the fact that the owner of a shipment may permit his particular stock to be confined for a period of thirty-six hours if he give his consent thereto in writing. But we do not see that that circumstance can have any bearing one way or the other, upon the question under discussion.

In *State v. Commissioners of Fayetteville*, 2 Murphey, (N. C.), 371, the defendants, being bound to keep the streets of an incorporated town in order, upon failing to keep several of them in repair, were indicted. It was held that there was but one offense, although there were three or four different streets which the defendants had failed to maintain in proper condition. Chief Justice Taylor said:

“It would be monstrous to charge them with separate indictments for every street in town, when the whole were out of repair at the same time; especially when upon one indictment a fine can be imposed adequate to the real estimate of the offense. Were such a doctrine tolerated, it is impossible to say where its consequences would end; for then an overseer whose road is out of repair might be charged in separate indictments, for every hundred yards; (why not every yard?) and be ruined by the costs, when perhaps a moderate fine would atone for the offense. This notion of rendering crimes of like matter infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced. It is the opinion of the court that the plea of *autre foit convict*, relied on by the defendant, is a bar to all the other indictments.”

And in the old English case of *Crepps v. Durden*, 2 Cowper, 640, where a baker was convicted by four separate convictions of selling small hot loaves of bread on the same Sunday to four different persons, it was held that all of the convictions except the first one were void on the ground that all the acts constituted but one offense. In delivering the opinion of the court Lord Mansfield, among other things, said (p. 646):

“On the construction of the Act of Parliament, the offense is, ‘exercising his ordinary trade upon the Lord’s day,’ and that, without any fraction of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so, whether it consists of one, or a number of particular acts, the penalty incurred by this offense is, five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord’s day, every stitch he takes is a separate offense; or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offense; but the killing ten more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here, repeated offenses are not the object which the Legislature had in view in making this statute. But singly, to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction the justice had no jurisdiction whatever in respect of the three last convictions.”

Congress did not esteem it necessary to be so severe as to permit a fine of five hundred dollars for each shipment in a train load containing possibly fifty shipments, when a single fine of five hundred dollars would answer as well.

Other valuable and well considered cases as to what constitutes a single offense are:

Friedeborn v. Commonwealth, 113 Pa., at pp. 244-5.

Commonwealth v. Robinson, 126 Mass., at pp. 260, 262.

Hurst v. State, 86 Ala., p. 604.

Hoiles v. United States, 3 MacArthur, at p. 371.

IV.

Jurisdictional Amount.

To give this court jurisdiction on this writ of error "the matter in controversy shall exceed one thousand dollars, besides costs." (26 Stats., p. 828, Section 6, last par.)

We claim that the amount in controversy is \$5,500, the maximum fine that could be assessed if the claim of the United States prevails. The effect of the consolidation of all the eleven cases into one case makes the amount in controversy \$5,500. *Beadles v. Smyser*, 209 U. S. 393. The effect of the consolidation is to make one case with as many counts as there were before separate cases. That is the way in which the United States District Attorney should have brought the suit. Bringing it that way would not have operated in the least against his contention that each shipment was subject matter for a penalty. Splitting the transaction into as many different suits as there were shipments ought not to deprive this court of jurisdiction.

There was an entry made in each case consolidating it with the earliest numbered case, to-wit: Case No. 1866. These entries of consolidation are found at the following places in the Record, viz: Top pp. 24, 32, 50, 58, 66, 74, 82, 90, 98, 106 and 112.

These entries of consolidation were made prior to the judgment of the District Court fixing the fine at \$100 and making it conclusive of the right of the United States to recover of the defendant in that court (present plaintiff in error) in each of the other causes consolidated with Case No. 1866 (R., top p. 10).

Writ of Certiorari.

But should this court be of opinion that there is not the requisite amount in controversy to give it jurisdiction on writ of error, we then submit our petition for the writ of *certiorari*, and ask the court to take jurisdiction on that ground, as the construction of the statute is of great importance to the rail carriers of the country.

Respectfully submitted,

EDWARD COLSTON,

Attorney for Plaintiff in Error.

JUDSON HARMON,

A. W. GOLDSMITH,

GEORGE HOADLY,

Of Counsel.

November, 1909.

APPENDIX.

(34 Statutes at Large, pp. 607-608.)

Chap. 3594. An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart

from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the nighttime but where the time expires in the nighttime in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who know-

ingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section, shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906.



Supreme Court of the United States

OCTOBER TERM, 1909.

*THE BALTIMORE & OHIO SOUTHWESTERN RAIL-
ROAD COMPANY,*

Plaintiff in Error,

No. 124.

vs.

THE UNITED STATES,

Defendant in Error.

*THE BALTIMORE & OHIO SOUTHWESTERN RAIL-
ROAD COMPANY,*

Plaintiff in Error.

No. 125.

vs.

THE UNITED STATES,

Defendant in Error.

Reply to Brief for Defendant in Error.

I.

THE STIPULATION.

The learned Solicitor General in his argument states that the stipulation referred to by him (R., 31) is a waiver by the present plaintiff in error of all errors that might be committed by the Circuit Court of Appeals.

There are several distinct answers to this argument:

1. The stipulation itself will bear no such construction. It was made, as appears from its date, December 18, 1907

(R., 32), after the cases had been docketed in the Circuit Court of Appeals and after a motion to advance them had been made and granted on November 8, 1907 (R., 31). It is obvious that it was made at the request of the District Attorney and for the purpose of saving to the United States the expense of printing the additional records, and that it should be limited to the effect contemplated by the parties at the time it was made and not stretched to produce the effect which it is manifest neither party desired nor intended; the true intent being simply that the cases in which the record was unprinted should be decided upon the record in those in which it was printed because the printed record fairly presented the questions raised by the unprinted records. For the reason that the stipulation will not bear the meaning claimed for it, the authorities cited by the Solicitor General have no application to this case.

2. Even if the agreement will bear the meaning which the learned Solicitor General seeks to put upon it, the agreement, by the weight of authority, is of a class which has been held to be invalid. It is an agreement to deprive this court of jurisdiction, and it has been held by the courts that an agreement that the decision of the trial court shall be final and conclusive does not deprive either party of the right of review by appeal or a writ of error.

Falkner v. Hunt, 68 N. C., 475.

Runnion v. Ramsey, 93 N. C., 410.

Sanders v. White, 22 Ga., 103.

Fohs v. Darling, 82 Ill., 142.

3. The alleged agreement is void for want of consideration.

It is well settled that an agreement, even made after judgment, to waive the right of review must have a valuable consideration.

Southern Railway Co. v. Glenn, 98 Va., 309, at p. 318.

Jones v. Spokane Valley Land & Water Co., 87 Pac., 65.

Ogdensburg & Lake Champlain Ry. Co. v. Vermont & Canada R. R., 63 N. Y., 176.

Ward v. Hollins, 14 Md., 158.

Mackey v. Daniel, 59 Md., 484.

In this case the agreement by the defendant in error to waive any errors that might be committed by the Circuit Court of Appeals was wholly without consideration. The agreement by the defendant in error that the United States should not be required to print the records certainly is no consideration; so that the only consideration which can be found in the stipulation is the agreement, if it exist, on the part of the United States to waive the right of review by this court. We do not think that the District Attorney, who signed this stipulation, had any authority to enter into a stipulation on behalf of the United States waiving possible errors by the Circuit Court of Appeals in advance of the hearing by that court. There is certainly nothing in the statute creating the office which gives him any such authority. The duty to prosecute civil actions on behalf of the United States does not authorize such an unusual act as the waiving of errors before trial, more particularly when, as settled by the decisions of this court (*United States v. Winston*, 170 U. S., 522; *United States v. Garter*, 170 U. S., 527), the district attorney, in ap-

pearing in the Circuit Court of Appeals, appears not as district attorney but as the special representative of the Attorney General. The fact that, under legislation passed since those cases were decided, the district attorney is not entitled to additional compensation for so appearing, does not alter the relation of the district attorney to the case.

II.

The learned Solicitor General argues that a writ of *certiorari* should not be allowed in this case because it was not applied for in time, and cites *The Conqueror*, 166 U. S., 114, in support of his argument.

It is true that in that case this court said that a writ of *certiorari* should **not** be applied for within a year by analogy to the time limited for a writ of error. But we feel that this court will not apply that decision to a case like the one now presented. In this case the application for a writ of *certiorari* was made by way of precaution simply. While, in our judgment, the amount in dispute in this case exceeds one thousand dollars, and for that reason we are prosecuting the writ of error, we knew that a question would or might be made as to the amount in dispute, and that it would or might be claimed that the amount in dispute did not exceed one thousand dollars, and, therefore, for the purpose of making sure that we should have the opportunity to present the true merits of this controversy to this court, we filed an application for a writ of *certiorari*. We therefore claim that, in case the court should be satisfied that our view, that the amount in dispute exceeds a thousand dollars, exclusive of interest

and costs, is erroneous, in that event the court should determine the merits of this case upon the application for a writ of *certiorari*; and we think that the limitation of time laid down by this court in that case, cited above, should not apply under circumstances like the present, and that the court, either upon a writ of error or by means of a writ of *certiorari*, should consider the merits of the controversy.

III.

The decisions cited on behalf of the United States on page 13 of brief do not, it seems to us, strengthen the case for defendant in error. It is still left standing on the sole authority of the decision of the Circuit Court of Appeals in the present case.

In the case of *N. Y. C. & H. R. R. Co. v. United States*, 165 F. R., 833, the court, in discussing this question at p. 843, admitted that the construction of the statute was doubtfull, and followed the decision in the case at bar without exercising any independent judgment.

In the case of *United States v. N. Y. C. & St. L. Ry. Co.*, 168 F. R., 699, the Circuit Court of Appeals followed the decision in the case at bar as a binding authority and without considering the questions involved.

So that neither of these cases is in any sense an independent authority supporting the claim of the United States in the case at bar.

Of the two District Court cases much the same may be said. Neither of them contains any examination of the question here presented, which question, as will be observed, the Circuit Court of Appeals for the first cir-

cuit admitted to be doubtful (see 165 F. R., 843), and they are certainly not convincing authorities in support of the decision below.

We, therefore, submit that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

JUDSON HARMON,

EDWARD COLSTON,

A. W. GOLDSMITH,

GEORGE HOADLY,

Attorneys for Plaintiff in Error.

February, 1910.



Supreme Court of the United States

OCTOBER TERM, 1910.

*THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,*

Plaintiff in Error,

Nos. 7 and 8.

vs.

THE UNITED STATES,

Defendant in Error.

Brief for Plaintiff in Error on Re-Argument.

STATEMENT OF CASE.

In these cases, or rather this case, because they were consolidated as one case in the District Court, a rehearing having been granted (*B. & O. S. W. R. R. Co. v. United States*, 216 U. S., 617), it seems advisable to file a new brief for plaintiff in error.

This case comes here by writ of error to the United States Circuit Court of Appeals for the Sixth Circuit under Section 6 of the Court of Appeals Act. (26 Stats., 828.)

The plaintiff in error also filed in this court, in due season, a petition for allowance of a *writ of certiorari*, which it will submit with the argument of this case upon the present writ of error.

The jurisdiction is not dependent upon any ground as to which the judgment of the Circuit Court of Appeals is made final. The matter in controversy exceeding, as we claim, a thousand dollars besides costs, this court has jurisdiction by writ of error under the provisions of the last paragraph of Section 6 of the Act. But as doubt may be suggested whether the consolidation of the cases creates the necessary jurisdictional amount, we filed in *due season* the petition for *certiorari*. We deem the proper construction of this statute a matter of great importance, both to live stock shippers and to rail carriers throughout the United States, and for that reason ask that the court take jurisdiction under the petition for *certiorari* in case the other ground of jurisdiction fail.

The cases arose as follows:

On the same day, to-wit, March, 22, 1907, the United States District Attorney for the Southern District of Ohio, filed in the District Court of the United States, at Cincinnati, nine separate cases against the plaintiff in error, numbered on the docket of that court 1866 to 1874, both inclusive; and on April 12, 1907, he filed a tenth case against the plaintiff in error; and on May 3, 1907, an eleventh case against the plaintiff in error.

The plaintiff in error was an interstate common carrier of live stock between East St. Louis and Cincinnati.

In each of said cases the United States sought to recover a separate penalty of \$500, under an act of Congress entitled "An act to prevent cruelty to animals

while in transit," re-enacted June 29, 1906 (34 Stats. at Large, p. 607. See Appendix to this brief).

A summary of the several live stock shipments in each petition is as follows:

Case No. 1866 was a shipment of hogs, cattle and calves, loaded at 3:30 p. m. February 2, 1907, in **2 cars**, by J. A. Brook, from Louisville, Illinois, to Cincinnati. (R., top p. 2).

Case No. 1867 was a shipment of cattle loaded at 1:45 p. m. February 2, 1907, in **1 car**, by Shan Chapman, from Ridgeway, Illinois, to Cincinnati. (R., top p. 16.)

Case No. 1868 was a shipment of cattle and hogs loaded at 2:30 p. m. February 2, 1907, in **2 cars**, by Mason & Kemmer, from Louisville, Illinois, to Cincinnati. (R., top p. 42.)

Case No. 1869 was a shipment of hogs loaded at 10 p. m. February 2, 1907, by Walter Van Gilder, from Sumner, Illinois, to Cincinnati. (R., top p. 50.)

Case No. 1870 was a shipment of cattle and hogs loaded at 2:15 p. m. February 2, 1907, in **4 cars**, by Wm. F. Harrell, from Omaha, Illinois, to Cincinnati. (R., top p. 58-59.)

Case No. 1871 was a shipment of cattle and hogs, loaded at 11 p. m., February 2, 1907, in **2 cars**, by Walter Van Gilder and Ber. McCane, from Sumner, Illinois, to Cincinnati. (R., top p. 67.)

Case No. 1872 was a shipment of hogs and calves, loaded at 3 p. m., February 2, 1907, in **1 car**, by J. H. Brown, from Iola, Illinois, to Cincinnati. (R., top p. 75.)

Case No. 1873 was a shipment of hogs, sheep and calves, loaded at 10 p. m., February 2, 1907, in **1 car**, by Brian, Shick & Co., from Sumner, Illinois, to Cincinnati. (R., top p. 83.)

Case No. 1874 was a shipment of hogs and calves, loaded at 10 p. m. February, 2, 1907, in **1 car**, by A. Louis Oder, from Olney, Illinois, to Cincinnati. (R., top p. 91.)

Case No. 1880 was a shipment of hogs, cattle and calves, loaded at 7:15 p. m., February 2, 1907, in **3 cars**, by Shannon Bros. & Henry, from Noble, Illinois, to Cincinnati. (R., top p. 99.)

Case No. 1884 was a shipment of hogs, cattle and calves, loaded at 8:30 p. m., February 2, 1907, in **3 cars**, by Chaffin & Knowles, from Clay City, Illinois, to Cincinnati. (R., top p. 107.)

In each action it was alleged by the United States that the live stock had been confined on the cars in which they were carried, without unloading for feeding, rest and water, beyond the time allowed by law.

The statute is, that no railroad over which live stock is transported from state to state shall confine the same in cars for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding for a period of at least five consecutive hours. But there is a proviso to the statute, introduced for the first time by the re-enactment of June 29, 1906, which says that the time of confinement *may* be extended to thirty-six hours upon the written request of the owner or person in custody of a particular shipment, which request shall be separate and apart from any printed bill of lading or other railroad form (see Appendix to this Brief).

Such request was made as to ten of the cars in question here. But those cars were not hauled in a separate train, but in the same train with eleven cars of live stock as to which no such request was made. Under these circumstances we presume that the request for extension of con

finement period to thirty-six hours became of no importance. However, all the cattle were confined beyond thirty-six hours, and the request for extension of confinement to thirty-six hours loses significance.

The plaintiff in error filed a separate answer in each of said cases. The answers in all the cases were the same, *mutatis mutandis*. The answers (R., top p. 5) admitted the shipment of the live stock, and admitted its detention beyond the statutory time. They then aver that the cars containing all the live stock mentioned in the several suits composed a single train of cars, to-wit, train No. 98; that said live stock was transported from the several points of shipment to destination in a single train of cars, and were, while being thus transported in the same train, confined beyond the statutory period. The plaintiff in error further averred in said answers that it was guilty of but one offense, and that it was liable for but one penalty, not exceeding \$500 in amount.

The plaintiff in error subsequently moved the court to consolidate each case with case No. 1866 (R., top p. 8); and the United States, at the same time, moved the court for a separate judgment in each of the several cases, "for the reason that each of said cases should be treated as a different *cause of action* and a separate penalty assessed in each." (R., top pp. 9, 10). See the entries of consolidation at top pages 24, 32, 50, 58, 66, 74, 82, 90, 98, 106 and 112 of Record. A separate entry was made in each case bearing a later number than No. 1866 consolidating it with that case thus making a single case having one petition containing as many counts as there had been cases. And afterwards, having heard the evidence as to the reasons for the detention of the live stock beyond the statutory period for the purpose of fixing the amount of the fine, the court ordered and adjudged the plaintiff in

error to pay the sum of \$100 and costs; and that the payment of said sum should be a bar to the right of the United States to recover from the plaintiff in error any penalty in the other cases (R., top p. 10). The United States prosecuted error to the Court of Appeals to reverse the judgment of the District Court consolidating the cases and to reverse also its judgment ordering that the payment of one penalty in the sum of \$100 should operate as a bar to the recovery of any further amount by reason of delay of live stock in train 98. The assignments of error were that the court erred in consolidating the cases, and in holding that there was but one offense and but one penalty (R., top pp. 11, 12), and in refusing to render a separate judgment for a separate penalty in each case.

Attention is called to the fact that the United States at no time denied in the Court of Appeals that there was a consolidation of all the cases as one case under No. 1866. But the District Attorney docketed his petitions in error in that court, perhaps for motives of convenience, as being in case No. 1866 and in case No. 1867. But the record and proceedings in all the cases were sent to the Court of Appeals with those writs of error and came under the jurisdiction of the Court of Appeals. The record and proceedings in all the cases are also brought here. The Court of Appeals in its opinion held that the cases were properly consolidated under Section 921, Revised Statutes of the United States (R., top p. 116); but reversed the judgment of the District Court in so far as it held that there was but one offense committed and one penalty incurred. The Court of Appeals remanded the cases with directions to enter judgment therein in accordance with its opinion (R., top p. 114). Relying upon *United States v. Sanges*, 144 U. S., 310, the plaintiff in error filed in the United States Court of Appeals a peti-

tion for rehearing, claiming that the case was a criminal case from which the United States had no right to prosecute error (R., top p. 120). But the Court of Appeals held that the case was a civil case and not a criminal case, and overruled the petition (R., top p. 126). We presume the question is put at rest by the case of *Hepner v. U. S.*, 213 U. S., 103.

ARGUMENT.

At the expiration of the twenty-eight hour and also of the thirty-six hour statutory period of confinement, all the cars in which the cattle and hogs were being transported constituted but a single train. The statutory period had not been exceeded in respect of any car or shipment before it was merged into and had become part of train 98. So that the confinement of the stock beyond the allowed time, without unloading it for rest, food or water, was the result of a single act or omission, viz.: failure to stop the train and unload the stock for rest, food and water. We contend, therefore, that there was but *one* offense, for which but one penalty could be assessed, and that the defense of *autre fois convict* made by defendant below is good.

Section 3 defines the offense. The language is that—

“any railroad * * * who knowingly and willfully *fails to comply* with the provisions of the two preceding sections shall for every such failure be liable,” etc.

So that it is *failure to comply* that draws the penalty. To comply with what? With the requirement that no live stock be *confined* in cars for a longer period than twenty-eight hours without unloading, etc. It is the *con-*

filing for the longer period than allowed that makes the offense. It is not confining any particular number of cattle that constitutes the offense. The number of cattle so confined, whether we estimate it by the head, or by the numbers of shipments, or by the carloads, is unimportant. The offense is *confinement of cattle*; and the offense is necessarily *a single offense where the cattle confined are all on the same train.*

Suppose the offense charged be that cattle were unloaded into pens not "properly equipped," as might be charged under Section 1 if the facts warranted it. Could any one say in that case that there was a penalty for every head, or for every car load, or for every shipment of stock?

Our insistence is well expressed by the District Judge in the memorandum opinion filed in this case (R., top pp. 23, 24). He said:

"Here the train carried distinct shipments and the railroad company was necessarily compelled to deal with them as such in every respect BUT ONE, *namely, the unloading of the animals for rest, feed and water.* The company could not, without violating the law, unload some of the shipments to the exclusion of the others, *nor extend the time of confinement of some of them without the written consent of all.* The law requires the railroad company to stop its trains carrying animals, once every twenty-eight hours and unload the animals for rest, food and water, and imposes a penalty for the failure to do so. *It deals with the operation of these trains, not with the different shipments which the trains may carry.*" [Italics ours.]

The present Act of Congress (See Appendix) provides, in substance, as follows:

"Section 1. That no railroad * * * whose road forms part of a line of road over which cattle * * * shall be conveyed from one state * * * into or through another state * * * shall confine the same in cars * * * for a longer period than twenty-eight consecutive hours without unloading the same *in a humane manner*, into properly equipped pens, for rest, water and feeding for a period of at least *five consecutive hours*, unless prevented by storm or by accidental or unavoidable causes which can not be anticipated or avoided by exercise of due diligence and foresight: Provided, that upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours."

~ Section 2 provides that—

"the feeding and watering of the animals shall be done by the owner or person having custody thereof, or, in case of his default in so doing, then by the railroad * * * transporting the same * * *, and such railroad shall have a lien upon the animals for food, care and custody furnished collectible at destination."

Section 3 provides that—

"any railroad * * * who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

The Government's Claim.

The government's claim leads to this: That if there be fifty head of horses, each horse belonging to a different shipper and consigned to a different consignee, but shipped on the same train and the horses be detained beyond the statutory time, there should be fifty penalties because each horse constitutes a separate shipment; but that if all the horses belong to the same person and be shipped to the same consignee by the same train, there would be but one penalty.

The Railroad Company's Claim.

The railroad company claims that the detention of the live stock aboard the same train constitutes but one offense or failure to comply with the statute. In this case the factor of offense was the train. This live stock was being moved as a train load, and as a train load the cattle were all confined beyond the statutory period. They were not moved in shipment units nor by car units, but the unit was the train; and the confinement beyond the proper period was the fault of the train. It was the offender.

Congress has not said in the statute that the offense shall be per shipment. If Congress had intended there should be a fine of five hundred dollars for each shipment delayed, it was easy to say so. Bearing in mind the rule of interpretation of penal statutes, the only reasonable construction of the statute is that the detention of all stock on the same train constitutes but one offense.

Construction of the Old Statute.

The old statute (Sections 4386, 4388), had undergone interpretation by the courts before the re-enactment of

June 29, 1906 (Appendix to this Brief). The government started out by claiming that the penalty attached to each head of stock. And in the case of *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep., 209, the Government actually sued for penalties amounting to ten thousand dollars, being at the rate of one hundred dollars for each animal so confined. But the court, Nelson, J., held that a penalty of one hundred dollars for each animal was not the penalty imposed by the statute. The court said (p. 211 at bottom):

“The confinement of the entire number of animals for a longer period than twenty-eight consecutive hours, without unloading for rest, water and feeding, is a single offense, for which the defendants are made liable to the penalty. By no fair construction of the statute can the unlawful confinement of each animal be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of animals carried.” [Italics ours.]

In *United States v. St. Louis & S. F. R. R. Co.*, 107 Fed. Rep., 870, the action was for penalties for confining cattle in transit beyond the limit allowed. There were ten counts in the declaration. Each count represented a carload, although all the carloads were in one train. The amount of penalty sought to be recovered was \$500 for each car. The cattle belonged to the same owner. On a motion to require the Government either to consolidate all the counts or to elect one count on which to proceed so as to make but one offense, it was held that the motion should be granted. The court, after alluding to the case of *United States v. Boston & Albany R. R. Co.* (*supra*), said (p. 872):

“No reason can be assigned, in the opinion of the court, why the unlawful confinement of each

car load of animals should be held to constitute a separate offense, and thus the penalty be multiplied by the whole number of car loads shipped, which would not apply with equal force to the unlawful confinement of each animal. Manifestly, if Congress had intended to impose upon a railroad company the maximum penalty of \$500 for each head of cattle that might be unlawfully confined upon one of its trains, it would not have left it to construction or inference; and it may be with equal propriety said that if Congress had intended to inflict so severe a penalty as \$500 for each car load of cattle that might be unlawfully confined, it would not have left it to construction or inference. It was an easy matter for Congress to have said, if it had so intended, that the unlawful confinement of each animal or each car load of animals should constitute a separate offense. And in reference to a statute so highly penal as this the construction must be strict—equally as strict as if it were a statute creating a criminal offense. Nothing must be imported by construction into a penal statute which is not within its spirit and its letter.”

The only difference between that case and the present case lies in the fact that all the cattle belonged to the same person; whereas here they belonged to different persons and were consigned to different consignees. But we can not see why that fact should make any difference upon the question whether one offense or more than one offense has been committed.

Congress Content with Prior Interpretation.

At the time the act was put in its present form there were these two decisions relative to the application of

In White-Smith Music Co. v. Apollo Co.,
209 U. S., at p. 14, this court said:

"Since these cases were decided, Congress has repeatedly had occasion to amend the copyright law. The English cases, the decision of the District Court of Appeals, and Judge Colt's decision must have been well known to the Members of Congress; and although the manufacture of mechanical musical instruments had not grown to the proportions which they have since attained they were well known, and the omission of Congress to specifically legislate concerning them might well be taken to be an acquiescence in the judicial construction given to the copyright laws."

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the penalty clause which was worded the same in the old act (Sec. 4388, Rev. Stats.) as in the new or amended act (Sec. 3). Congress was cognizant of these two decisions; but made no change in the penalty clause. Congress knew that the law had been interpreted in these two decisions to mean that the confinement of a number of cattle on the same train was a single offense, and that the penalty did not multiply by either the number of cattle or by the number of cars, or by the number of shipments.

This court in *Mason v. Fearson*, 9 How., 258, last paragraph, said:

“With the knowledge of our construction, like words being again repeated by Congress, it may well be considered that a like construction was intended, and was expected to be given to those words.”

In *United States v. G. Falk & Bro.*, 204 U. S., 143, this court held that the Attorney-General having construed a certain section of the Tariff Act of 1890 in a certain way, and that construction having been followed by officers in charge of the administration of the law, it would be considered that Congress had adopted that construction in the act of 1897, having made no specific change in that respect.

And in *United States v. Hermanos y Compania*, 209 U. S., 339, this court said:

“And we have decided that the re-enactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction.”

And in *New Haven R. R. v. Interstate Commerce Commission*, 200 U. S., at 401, this court said:

“We make this concession, because we think we are constrained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed when not plainly erroneous, must be treated as read into the statute.”

It must be presumed, therefore, in view of these prior decisions construing the penalty clause, and in view of the letter of the Secretary of Agriculture, hereafter quoted in part, that Congress intended that the construction placed upon the penalty clause should remain, *and that there should not be as many penalties as there were head of cattle, or cars of cattle, or shipments of cattle.*

This is striking evidence that Congress did not intend in re-enacting this law that the penalty should be multiplied by the number of shipments, nor, by anything else.

In spite of this, however, the government now goes back to an insistence that the shipment is the unit of offense; and that in every case where the railroad knowingly and willfully confines live stock in cars for a period longer than the time prescribed by statute the penalty must be multiplied by the numbers of the shipments into which all the cattle in transit happen to be divided. This insistence is based upon a proviso introduced in Section 1 of the old law at the time of the re-enactment. That proviso is in the following words:

“*Provided*, that upon the written request of the owner or person in custody of the particular shipment, which written request shall be separate and apart from any printed bill of lading, or

other railroad form, the time of confinement *may* be extended to thirty-six hours." [Italics ours.]

The time of confinement without unloading for food, rest and water allowed by the old statute was in every case twenty-eight hours; but this proviso allowed, but did not require, that period to be extended to thirty-six hours upon written request of the owner or person in custody of a shipment. Of course the owner or person in custody of one shipment could not make request for prolongation of confinement of live stock that he did not own or control. Hence the necessity of limiting the proviso to the particular shipment owned or controlled by the person making the written request. But that was its sole purpose. It reflects nothing whatever upon the matter of how the penalty should be assessed. The purpose of the changes made by the amendment of June 29, 1906, the present law, are fully set forth by the Secretary of Agriculture, at whose instance the amendment was introduced in Congress. While the amendment was before the Congress the Secretary of Agriculture addressed a communication to the Chairman of the Senate Committee having the matter under consideration, in which he set forth the reason for making the changes. (See p. 3774, Congressional Record, Senate, 59th Congress, First Session.) After enumerating certain reasons not important to the present controversy, the Honorable Secretary said:

"In the present bill it is purposed that the time during which animals may be confined by the carrier without food, rest or water shall remain at twenty-eight hours, the time provided in the present law with the exception that upon the written request of the owner or person in custody of the shipment, the time may be extended to thirty-six hours. It frequently happens that

the twenty-eight hour limit has expired when the shipment was within a few hours of the destination, and if the law is made sufficiently elastic to enable the shipper to control this matter, it is thought that less suffering will result to the livestock in transit. It is the opinion of the best informed owners and shippers of livestock that when livestock can be carried to market within thirty-six hours, it is better and more humane to allow them to go through without unloading than to unload at the end of twenty-eight hours. Based upon careful observation of the workings of the law, the treatment of the livestock to the advantage of the shippers and owners thereof, it is the opinion of the Department of Agriculture that if certain other amendments to the present law, which are incorporated in the bill now in discussion, shall be adopted, the time during which the livestock may be confined in cars without food, rest or water may be extended from twenty-eight hours to thirty-six hours without disadvantage to the livestock. The great western markets are Chicago, East St. Louis and the Missouri River towns. The ranges and food lots are so located that if the railroads give the shippers anything like reasonable service with the thirty-six hour limit, by far the larger proportion of the livestock can be transported to market within thirty-six hours, and this will obviate the necessity for unloading the greater part of the stock. With the thirty-six hour limit it will not be necessary to unload livestock from any locality more than twice."

There was a very interesting debate in the Senate at the time the amendments embodied in the present statute were adopted. (See Congressional Record, Senate, 59th Congress, pp. 3766-75, 8310-28.) That debate discloses no

intimation of any purpose to change the penalty provision in any respect whatever.

View Taken by the Court of Appeals.

Notwithstanding the fact that neither in the communication of the Secretary of Agriculture to the chairman of the Senate Committee nor in the debates that followed, nor in the proviso itself is there any evidence of intention of increasing the penalty by multiplying by the number of shipments, yet the learned judge who wrote the opinion of the Court of Appeals spoke of this proviso as "*the key*" by which the meaning of the act may be interpreted.

He said (R., top p. 117, last paragraph):

"It may be admitted that the statute is not so clear upon this subject as would be desirable. The language is quite general and there is but one salient expression upon which we can lay hold with confidence. This is contained in the provision that the twenty-eight hour limitation may be extended to thirty-six hours 'upon the written request of the owner or person in custody of the particular shipment, which written request shall be separate and apart from any printed bill of lading,' etc. It seems to us this gives the key by which the meaning of the act in this respect may be interpreted. It is the owner of the shipment or his representative having the custody of the shipment who is to be referred to as authority for prolonging the transportation without unloading; and it is manifestly implied that there is a bill of lading or other contract which governs the transportation of that shipment. No other person than the one concerned with that shipment is given the power to prolong the transportation without unloading. And one shipper could not exercise his right if he was

one of several; or if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on."

We confess that we are unable to find the "key" that unlocks the hidden meaning which the learned judge discovers in this proviso. He says that the proviso implies that there is a bill of lading or other contract covering the transportation of every shipment. But there have always been such shipping documents, and the reference to them in the proviso argues nothing touching the penalty clause. The only reason for requiring that requests for prolongation be a writing apart from "any *printed* bill of lading, or other railroad *form*," was to prevent the shipper from consenting to such prolongation unadvisedly, and to prevent the insertion of such requests into printed bills of lading and contract forms becoming a practice, thereby making the law a thirty-six hour law in all cases. We do not see that this reference to bills of lading and forms of contract is in any way an aid to interpretation.

As we have said the only purpose of the proviso was to arm the shipper with the means of prolonging the time of confinement where he thought that the destination could be reached within thirty-six hours, but could not be reached within twenty-eight hours, it being more humane to unload cattle once than twice.

The next proviso, that sheep shall not be unloaded in the night-time, shows that the only purpose of Congress in all this legislation was to secure, as far as possible, humane treatment of animals in transit. There was no purpose to protect private rights of owners. But it was, of course, necessary to confine the privileges of extension to those owners or shippers who desired it. It would be unreasonable that one shipper of several should have this

privilege as to stock other than his own. To conform to this, the proviso confined the right of extension of time to the owner of "the particular shipment;" meaning *his* shipment.

There is nothing in this that furnishes ground for supposing that Congress intended to multiply the penalty by the number of shipments, as the learned judge of the Court of Appeals thought was its effect.

A request for the prolongation of the time as to some cattle would not affect other cattle as to which no such request had been made. If there were in the same train a carload or a shipment of 36 hour cattle and a carload or shipment of 28 hour cattle, the 28 hour cattle would have to be unloaded at the expiration of that time for five hours' rest, and the train go on; or else the prolongation would have to be disregarded. This was recognized by the learned judge of the Circuit Court of Appeals in his opinion wherein he says:

"And one shipper could not exercise his right" (of prolongation) "if he was one of several; or if he could, it would disable other shippers from exercising the right to have their stock unloaded for rest and feeding and then go on." (R., top pp. 117-118.)

It seems, therefore, that to make this proviso workable would require unanimity of all shippers by the same train as to the period of transportation without unloading. The tendency of the proviso is therefore in favor of making the train rather than the shipment the factor for determining the penalty.

But no result that we can deduce from it affords reason for treating each shipment as a unit of offense. There is no disclosure of a purpose on the part of Congress to multiply penalties when it adopted the proviso; and we

think that the argument of the Court of Appeals is utterly untenable, and that its decision was in the nature of legislation.

The practice of the railroads in running solid stock trains was well known to Congress, and if the Congress had intended this law should carry the multiple penalties which the Court of Appeals says it does, the Congress would have said so. We suspect there was a feeling in the mind of the Court of Appeals that the single penalty of \$500 would not be punishment enough to deter the railroads from violating the statute. But considerations of that sort address themselves to the Legislature and not to the judiciary.

It will be observed how shifting the attitude of the Government has been on the subject of the unit of offense under this legislation. At first the Government claimed that the unit was each head of stock; then it was the car; now it is the shipment.

The present decision of the Court of Appeals has been followed by other decisions of lower courts. But we think those cases add no weight to the decision of the Court of Appeals.

The Court of Appeals for the First District, in the case of *N. Y. C. & H. R. R. Co. v. United States*, 165 Fed., 833, gives the decision of the Court of Appeals but faint countenance, if any at all. The only allusion to the decision in the course of a long opinion is at p. 843, viz:

“It seems that in one or more of the trains on which the cattle were transported there were several consignments; and, in imposing the penalty, the learned judge of the District Court held that each consignment was a unit under the statute. *Undoubtedly the statute is capable of a construction more favorable to the plaintiff in error; but there is so much doubt about it*

that we see no reason for departing from our *usual practice*, which leads us to follow the decision of the Circuit Court of Appeals for the Sixth Circuit in *United States v. Baltimore R. Co.*, 159 Fed., 33, in harmony with the ruling of the District Court in this particular." [Italics ours.]

Great significance attaches to this statement that the statute is *undoubtedly* "capable of a construction more favorable to the" carrier. Being a penal statute, it ought to have received that "more favorable construction;" and would have, if the question had been *res integra*. But the court, in deference to "*usual practice*," yielded to this decision of the Court of Appeals.

United States v. N. Y. C. & St. L. R. Co., 168 Fed., 699, is a decision by the Court of Appeals for the Second Circuit, only ten lines long, reversing the judgment of the District Court on authority of the decision of the Court of Appeals in the present case, merely.

The present decision was also followed by the Court of Appeals for the Ninth Circuit, in *Southern Pacific Ry. Co. v. United States*, 171 Fed., at p. 363, but there was no discussion whatever as to the penalty clause of the statute.

In *United States v. Oregon R. & N. Co.*, 163 Fed., 640, Wolverton, District Judge, without any discussion as to the proper interpretation of the penalty clause of the statute, also follows the Court of Appeals in the present case.

In *United States v. A. T. & S. F. Ry. Co.*, 166 Fed., p. 160, the decision is by Landis, District Judge, who said at p. 164, that in his view of the law there were "as many offenses as there are shipments confined beyond the period prescribed;" but he gives no reason why that is so.

That the decision of the Court of Appeals in the pres-

ent case has produced a progeny of error is not surprising. It comes from the courts following that decision as a way out of what was regarded as a dilemma of interpretation.

II.

The Rule for the Interpretation of Penal Statutes is Against the Conclusion Reached by the Court of Ap- peals.

This court has been quite consistent in holding that a penal statute should be construed strictly. Certainly it has been so held by this court where such construction does not contravene a plain and manifest purpose of the Legislature to the contrary, as in *United States v. Corbett*, 215 U. S., 233.

United States v. Sheldon, 2 Wheat., 119, is the first case we find where this principle of construction was applied by this court. There was an act of Congress applicable to a state of war existing between Great Britain and the United States which provided that if any citizen of the United States, or person inhabiting the same, "shall transport, or attempt to transport, over land or otherwise, in any waggon, cart, sleigh, boat, or otherwise, * * * any articles of provision from the United States to Canada, etc., the waggon, cart, sleigh, boat, or the thing by which the said articles are transported, or attempted to be transported, together with the articles themselves, shall be forfeited; and the person aiding, or privy to the same, shall forfeit to the United States a sum equal in value to the waggon, etc., or thing by which the said articles were transported, and shall moreover be considered as guilty of a misdemeanor and liable to fine and imprisonment." Defendant was indicted in the United States

District of Vermont for transporting over land, in November, 1813, a certain number of fat oxen, cows, steers and heifers from a place in the United States to Canada. Two questions were submitted: (1) whether these animals were articles of provision within the meaning of the law; (2) whether driving them *on foot* was a transportation of them within the act of Congress. It was held unanimously that the animals constituted articles of provision within the meaning of the law. The court said the second question was attended with more difficulty, namely, whether the *driving* of living fat oxen, etc., was a *transportation* of them within the intent and meaning of the law. The majority of the court held it was not. The court held that the transportation of an article in a wagon or otherwise necessarily meant carrying or conveying it in that or some other vehicle, by whatever name it might be distinguished, and that a transportation of the article in a vehicle other than the kind of vehicle named would not be a transportation within the meaning of the statute. The argument that, after all, the great purpose of the Legislature was to prevent the enemy from being supplied with provisions from the United States, and that the mischief would be the same whether the enemy was supplied with provisions in one way or another, was rejected by this court in the following forceful language:

“It may be admitted, that the mischief is the same, whether the enemy be supplied with provisions in the one way or the other; but this affords no good reason for construing a penal law *by equity*, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law.” [Italics ours.]

The conclusion of the court was that driving living fat oxen on foot was not a transportation of them within the

meaning of the act of Congress.

This rule as to the interpretation of statutes is declared by this court to be as old as construction itself.

In the case of *United States v. Wiltberger*, 5 Wheat., 95, Chief Justice Marshall, delivering the opinion of the court, said:

“The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the Legislature, not the court, which is to define a crime, and ordain its punishment.”

But courts *do ordain* punishment when they undertake, as was done here, to multiply the penalty that the Legislature has prescribed.

In *Elliott v. Railroad Co.*, 99 U. S., at p. 576, this court said:

“Penalties are never extended by implication. They must be expressly imposed or they can not be enforced.”

In *France v. United States*, 164 U. S., 682-3, this court said:

“The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we can not sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. * * * If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it

is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

Bolles v. Outing Company, 175 U. S., 262, was an action to recover penalties under a section of the Revised Statutes for printing a copyrighted photograph of the yacht "Vigilant." The copyright law provided that if any person, after the recording of the title of any map, chart, musical composition * * * or photograph, should, without the consent of the proprietor of the copyright first obtained in writing, print, publish, or sell any copy of such map or other article, he should forfeit to the proprietor all the plates on which the same were copied, and should forfeit one dollar for every sheet of the copy *found in his possession*. A photograph of the yacht "Vigilant" under full sail had been copyrighted under the title "Vigilant No. 4." A copy of this photograph was made and published in the magazine known as "The Outing." On the trial of the case proof was offered as to the number of copies that *had been* in the defendant's possession at any time within two years next preceding the commencement of the suit. To this the defendant objected, claiming that proof could be offered only of the number of copies found in his possession at the time of the seizure, not the number that might be traced as having been in his possession during the period of two years. The defendant's contention was sustained by this court as being the proper construction of the statute. The court said (p. 265):

"The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the Legislature. If the language be plain, it will be

construed as it reads, and the words of the statute given their full meaning; *if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial.*" [Italics ours.]

And at p. 268 the court further said:

"Had Congress designed the extended meaning claimed for these words 'found in his possession,' it would naturally have used the expression 'found or traced to his possession,' or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

And we may say in the present case that had Congress designed to inflict a penalty for each shipment of stock detained in transportation beyond twenty-eight hours, it would not have left that matter in doubt.

But nothing could be more conclusive of this case than the decision of this court in *United States v. Harris*, 177 U. S., 305, where it was held that this was a penal enactment and that the rule of strict construction applied to it. Accordingly this court held that a receiver operating a railroad was not within Section 4388, which provided that—

"Any company, owner or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding acts, shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars."

In vain the Government urged that the words "any company" were intended to cover the case of every transporter by rail of cattle as interstate commerce, and that

in order to effect that intent those words must be construed to include railroad transportation regardless of whether the operation of the road in such transportation was by a company or by the receiver of a company. The court rejected this plausible argument as follows:

“It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the states and of the United States, whose object is to promote the safety, comfort and convenience of the traveling public. But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments under which this suit was brought. Was it the purpose of Congress when prescribing a penalty for any company, owner or custodian of animals who knowingly and willingly fails to comply with the directions of the statute, to include receivers? Can we fairly bring receivers within the penal clause by reasoning from a *supposed or an apparent motive* in Congress in passing the act?” (pp. 308-9.)

And the court, having regard for the rules of proper construction held that this statute could not be interpreted to cover the case of a receiver, and used this further language:

“It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the Legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute.” (p. 309.)

No more can it be said it was an oversight or inadvertence that Congress did not attach a penalty to each shipment, or car load or head of stock. Congress knew that cars in which cattle are transported over lines of railroad either compose an entire train, or a part of a train; that cattle are not as a rule transported by the single car, nor by the single shipment.

In consequence of the decision in the *Harris case* the Congress in re-enacting the law enlarged Section 1 so as to cover in express terms receivers, trustees or lessees operating a railroad. And if Congress had intended that the penalty clause should receive a different construction from that put on it by the prior decisions we have referred to, it would at the same time have made provision to that effect at the time of this re-enactment.

In *Werckmeister v. American Tobacco Co.*, 207 U. S., 381, this court said:

“This section of the statute is penal, and there should be *especial care* to work no extension of its provisions by construction.” [Italics ours.]

The aim of this statute was not to protect ownership of cattle. There was ample law for that purpose already in existence in the states. The only purpose of the law was to protect the animals themselves from too long confinement without unloading for food, rest and water; and the violation of the statute would ensue when cattle are confined beyond the restricted period regardless of their ownership or of the number of shipments.

III.

**One Offense Can Not be Split Into Many, and Penalties
Thereby Multiplied.**

In *1 Bishop's New Criminal Law*, Section 793, p. 479, it is said:

"It is often a nice question whether or not a transaction is separable into more crimes than one, and what crimes."

The author then illustrates as follows:

"A man may violate the prohibiting statute by 'exercising his ordinary calling' in a single act. Thereupon if he continues to perform like acts throughout the day does he commit more offenses than one? The judicial answer to this question is that he does not. For further example a statute provides 'a fine for performing any worldly employment or business' on Sunday, and it was held that a person who keeps open his shop and makes successive sales to different persons throughout the same day subjects himself to but one fine."

In regard to the larceny of chattels the same author (Section 1061, Vol. 1) says:

"The cases present contradictions quite irreconcilable. It would be reasonable to hold that one act or even one transaction of feloniously taking and carrying away chattels constitutes, within our constitutional guaranty, but one offense. * * * *And since the averment of ownership is merely to identify the things, if they have different owners, all could as well be included in one count as though their identifying particulars differed in any other respect.*" [Italics ours.]

Then speaking of the English decisions on the point the author says:

“An English judge once ruled that where a man stole at one time two pigs belonging to the same person he might be convicted of the larceny of one pig, and afterwards of the larceny of the other.”

And the author adds:

“If the pigs had different owners, there would be American authorities the same way. But where the articles have all one owner the authorities are pretty distinct that the transaction can not be cut up in this English fashion. Even where there are divers owners, the same conclusion, it is believed, is the one better supported by our authorities, as certainly it is better in legal reason.”

It is important to bear in mind that, in a criminal case no significance attaches to ownership except as it is a matter of identification of the property, although, of course, it is different where the suit is a civil action to recover for injury to property. This is forcibly put in the case of *Nichols v. Commonwealth*, 78 Ky., 180, where a party was indicted for the larceny of twenty-one chickens and seven geese, the personal property of Mrs. John Thorns, Larkin Grigsby, and Eli Brooks. It turned out upon the evidence that the portions of the property owned by Mrs. Thorns and Grigsby were taken from the same place; but that such of it as belonged to Brooks was taken from a place at least 200 yards from the place from which the others were taken, but upon the same plantation. It was all stolen the same night and brought from the country into the city of Lexington.

The court refused to charge the jury that in fixing the value of the property found to have been stolen, in order

to ascertain the grade of the offense, they should not add together the value of the different parcels so found to have been taken from different places; and this was assigned for error. In disposing of that branch of the case the court said (p. 181 at bottom):

“Larceny is an offense against the public, and the offense is the same whether the property stolen belongs to one person or to several jointly, or to several persons, each owning distinct parcels. If a flock of sheep of which A owns five, B five and C five be feloniously asported by one and the same act, there are three trespasses but only one larceny: Each proprietor of a portion of the stolen sheep has sustained a civil injury, and may, indeed must, sue separately for the wrong suffered by him; but the public has sustained but one wrong, and can not maintain more than one prosecution, and if it attempt to do so, the judgment in the case first tried may be pleaded in bar of the remaining prosecutions.”

But inasmuch as the property of Brooks had been taken from a place 200 yards from the place where the property of Mrs. Thorns and of Grigsby was taken, it was held that they were distinct larcenies and separate offenses and the case was reversed for that reason. A conclusion reached not because of different ownership but because of the different places where the theft was committed.

Applying this principle to the case at bar, we claim that the entire train is but one place for the purpose of transportation, and that consequently there is but a single offense when all the cattle are confined in the same place beyond the limit allowed by law, and that the question of ownership cuts no figure. Some stress is placed by the Government upon the facts that the owner of a shipment may permit his particular stock to be confined

for a period of thirty-six hours if he give his consent thereto in writing. But we do not see that that circumstance should have any bearing one way or the other, upon the question under discussion.

In *State v. Commissioners of Fayetteville*, 2 Murphey, (N. C.), 371, the defendants, being bound to keep the streets of an incorporated town in order, upon failing to keep several of them in repair, were indicted. It was held that there was but one offense, although there were three or four different streets which the defendants had failed to maintain in proper condition. Chief Justice Taylor said:

“It would be monstrous to charge them with separate indictments for every street in town, when the whole were out of repair at the same time; especially when upon one indictment a fine can be imposed adequate to the real estimate of the offense. Were such a doctrine tolerated, it is impossible to say where its consequences would end; for then an overseer whose road is out of repair might be charged in separate indictments, for every hundred yards; (why not every yard?) and be ruined by the costs, when perhaps a moderate fine would atone for the offense. This notion of rendering crimes of like matter infinitely divisible, is repugnant to the spirit and policy of the law and ought not to be countenanced. It is the opinion of the court that the plea of *autre fois convict*, relied on by the defendant, is a bar to all the other indictments.”

And in the old English case of *Crepps v. Durden*, 2 Cowper, 640, where a baker was convicted by four separate convictions of selling small hot loaves of bread on the same Sunday to four different persons, it was held that all of the convictions except the first one were void

on the ground that all the acts constituted but one offense. In delivering the opinion of the court Lord Mansfield, among other things, said (p. 646):

“On the construction of the Act of Parliament, the offense is, ‘exercising his ordinary trade upon the Lord’s day,’ and that, without any fraction of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so, whether it consists of one, or a number of particular acts, the penalty incurred by this offense is, five shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord’s day, every stitch he takes is a separate offense; or if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and distinct offenses. There can be but one entire offense on one and the same day; and this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day; killing a single hare is an offense; but the killing ten more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here, repeated offenses are not the object which the Legislature had in view in making this statute. But singly, to punish a man for exercising his ordinary trade and calling on a Sunday. Upon this construction the justice had no jurisdiction whatever in respect of the three last convictions.”

Congress did not esteem it necessary to inflict a fine of five hundred dollars for each shipment in a train load containing possibly fifty shipments.

In *State v. Stevens*, 81 Vt., 445, there was an information charging cruelty to animals. It was moved in arrest of judgment that the information charged thirty differ-

ent offenses combined in one count, the animals being thirty cows. The motion was overruled. The court said:

"Some things done to two or more are properly alleged as constituting but one offense, for instance, assaulting two persons at the same time (*Commonwealth v. O'Brien*, 107 Mass., 208); administering poison to several persons by the same act (*Ben v. State*, 22 Ala., 9, 58 Am. Dec., 234); *overloading two horses harnessed to the same load.*" [Italics ours.]

In *Bishop on "Statutory Crimes"* (2d Ed.), chapter LXI (bot. p. 627) is on "Cruelty to Animals." Section 1121 reads:

'One Offense or More. How many offenses are constituted by a transaction contrary to these statutes may be determined by analogies from other crimes. If a man overdrives or overloads two horses harnessed together, the wrong is evidently but one. Yet, if in one transaction he beats the two severally, the acts will, in reason, be governed by analogy from assault and battery and from homicide, into which we need not enter."

In *Fontaine v. State*, 6 Baxter, 514, there was a purchase of three lottery tickets on one occasion, the tickets being attached together on the paper on which they were printed. This purchase was held to constitute but a single offense.

In *Woodford v. People*, 62 N. Y., 117, it was held that setting fire to a house in a row of thirty-five houses, each belonging to a different person, and which were destroyed, constituted but one offense. The case contains a valuable discussion of the subject of a single offense by Church, C. J., commencing p. 127.

In *United States v. Patty*, 2 F. R., 664, it was held that an indictment charging defendant with sending through the mails five hundred printed lottery circulars on each day from the first day of November to the tenth day of the following February constituted but one offense.

In *Commonwealth v. O'Brien*, 107 Mass., 208, an indictment charging an assault upon two persons at the same time was held to state but one offense. Gray, J., said;

“It is now well settled, though it was once held otherwise, that a man who assaults two persons at the same time may be charged in a single count with the assault upon both as one breach of the peace.”

In *State of Louisiana v. Batson*, 108 La., 479, it was held that, although a criminal act may operate on more than one person or thing, nevertheless it may be charged as one offense, and, an indictment charging in one count the murder of six persons is not bad for duplicity, unless it appears upon its face that the death resulted from two or more distinct acts.

In *Ward v. State*, 90 Miss., 249, an affidavit charging the larceny of one shirt-waist, property of Mrs. Howard, and twelve yards of calico, property of Carrie Ryan, stated but a single offense.

On the subject whether offenses committed against different persons are multiple or constitute but a single offense, it is stated in 12 Cyc., p. 289, that:

“By the weight of authority, where the same act or stroke results in the death of two persons an acquittal or conviction of the murder of one bars a subsequent prosecution for the killing of the other because the killing is but one crime and can not be divided. The rule also applies where

the same blow produces a separate assault and battery on two different persons."

In 22 Cyc., 383, it is said:

"A single act or transaction in violation of law may, as a general rule, be charged in one count as a single offense, although the act involves several similar violations of law with respect to several different persons."

In 25 Cyc., p. 61, it is said:

"Where several articles are taken from the same owner at or about the same time by the same thief, the better practice, in spite of the fact that there are technically several takings, is to regard the takings as a single offense, and to indict and punish but one. This is clearly the case when the goods are taken at the same time by one act or taking."

Other valuable and well considered cases as to what constitutes a single offense are:

Friedborn v. Commonwealth, 113 Pa., at pp. 244-5.

Commonwealth v. Robinson, 126 Mass., at pp. 260, 262.

Hurst v. State, 86 Ala., p. 604.

Hoiles v. United States, 3 MacArthur, at p. 371.

State v. Hennessey, 23 Ohio St., 339, at 347.

Smith v. State, 59 Ohio St., at 357-8.

IV.

Jurisdictional Amount on the Writ of Error.

To give this court jurisdiction on this writ of error
"the matter in controversy shall exceed one thousand

dollars, besides costs." (26 Stats., p. 828, Section 6, last par.)

We claim that the amount in controversy is \$5,500, the maximum fine that could be assessed if the claim of the United States prevails. The effect of the consolidation of all the eleven cases into one case makes the amount in controversy \$5,500. *Beadles v. Smyser*, 209 U. S., 393. The effect of the consolidation is to make one case with as many counts as there were before separate cases. That is the way in which the United States District Attorney should have brought the suit. Bringing it that way would not have operated in the least against his contention that each shipment was subject-matter for a penalty. Splitting the transaction into as many different suits as there were shipments ought not to deprive this court of jurisdiction.

There was an entry made in each case consolidating it with the earliest numbered case, to-wit: Case No. 1866. These entries of consolidation are found at the following places in the Record, viz.: Top pp. 24, 32, 50, 58, 66, 74, 82, 90, 98, 106 and 112.

These entries of consolidation were made prior to the judgment of the District Court fixing the fine at \$100 and making it conclusive of the right of the United States to recover of the defendant in that court (present plaintiff in error) in each of the other causes consolidated with Case No. 1866 (R., top p. 10).

In the brief filed in this case on behalf of the Government at the former hearing, the point is made that, owing to a stipulation made in the Circuit Court of Appeals on December 18, 1907 (R., top p. 31), only two of the ten or eleven cases were brought into that court from the District Court, leaving behind in the District Court the other nine cases, with an agreement as to them that judgment

should be entered in those cases for a fine if the law as ordered by the Court of Appeals should warrant it. But no such compact as that was made or thought of. We doubt if the District Attorney would have had power to enter into such compact on behalf of the United States without authority from the Attorney-General, his only authority for appearing in the Court of Appeals being as representative of the Attorney-General. (*United States v. Winston*, 170 U. S., 522; *United States v. Garter*, *id.*, 527.) We find no such authority in the record.

But aside from that, the stipulation does not have the effect which is now sought to be given to it. The stipulation is as follows (R., top p. 31):

"Stipulation entered into between Sherman T. McPherson, United States Attorney, S. D. O., and Harmon, Colston, Goldsmith & Hoadly, attorneys for defendant.

"It is agreed by and between the parties to these suits that in the hearing of these causes, the same being numbered 1866 and 1867, respectively, in the District Court, the remaining causes consolidated with said cause No. 1866, to-wit: Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880 and 1884, in the District Court, shall be controlled and disposed of in accordance with the decision of the Circuit Court of Appeals rendered in causes numbered 1770 and 1771; and that certified copies of the records in said causes Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884, shall be filed in the Circuit Court of Appeals, as part of said Cause No. 1770 in said court, but not printed, and counsel shall have the privilege to refer to and use any part of said record as they may desire." [Italics ours.]

It will be observed that this stipulation recognizes that all the cases have been consolidated with case No. 1866,

and that they "shall be controlled and disposed of in accordance with the decision of the Circuit Court of Appeals." This only means that all the cases shall be included in whatever judgment the Circuit Court of Appeals may pronounce. The judgment of the District Court, to which the writ of error was taken, was, in effect, a judgment in all the cases (R., top p. 10). Then the stipulation says that "certified copies of the record in said causes" (enumerating all of them) "shall be filed in the Circuit Court of Appeals, *as part of said cause No. 1770* in said court, but not printed." So that it is evident that the record in each of the nine other cases became part of the record of the other two cases. It is also evident that the only function of the stipulation was to waive the necessity of suing out a separate writ of error in each of the other nine cases and to make the writs of error in the two cases stand as writs of error in the other nine. By this means there was a saving not only of labor and cost of suing out so many writs of error, but also of the expense of printing the record in the other nine cases. But that all of the cases were taken to and came within the jurisdiction of the Court of Appeals is incontrovertible, as is apparent not only from the stipulation itself but from what was actually done.

In the petition for allowance of writ of error filed in the District Court (R., top pp. 10-11), the allegation is of errors not only in case No. 1866 but of errors "*in this cause and certain other causes consolidated herewith* by order of the court," etc., and the prayer is for an allowance of a writ of error to correct those errors. And in the assignment of errors accompanying the petition for a writ of error the errors pointed out are errors in each of said eleven cases; and the writ of error sued out for the purpose of correcting the errors aforesaid necessarily

brought to the Court of Appeals all the proceedings in all the cases.

The writ of error sued out from this court applies to all of the cases as being one case, and to all the proceedings therein (See petition for allowance of writ of error and assignment of errors in this record, top pp. 129-130, and the writ of error itself, top p. 128).

It is obvious, therefore, that all of the cases are before this court, and that the matter in controversy is whether there shall be eleven fines of not less than one hundred nor more than five hundred dollars, or a single fine already fixed at one hundred dollars.

All the cases representing, as they do, but a single controversy, and all having in fact been taken to the Court of Appeals and to this court as one case, it matters not, even if it be conceded, that the stipulation was that no writ of error should be taken except in two of the cases. Such agreement would be invalid for want of consideration.

Ogdensberg & Lake Champlain Ry. Co. v. Vermont & Canada R. R., 63 N. Y., 176.

Southern Railway Co. v. Glenn, 98 Va., 309, at p. 318.

Jones v. Spokane Valley Land & Water Co., 87 Pac., 65.

Ward v. Hollins, 14 Md., 158.

Mackey v. Daniel, 59 Md., 484.

Writ of Certiorari.

But should this court be of opinion that there is not the requisite amount in controversy to give it jurisdiction on writ of error, we then submit our petition for the writ of *certiorari*, and ask the court to take jurisdiction on that ground, as the construction of the statute is of great importance to the country.

It is suggested in the brief filed for the Government at the former hearing of this case that this writ of *certiorari* ought to have been submitted to the court prior to the argument of the writ of error, and that a party can not preserve indefinitely his opportunity for asking a *certiorari*, and *The Conqueror*, 166 U. S., 114, is cited in support of the suggestion. But we are not trying to preserve opportunity to present the writ of *certiorari* indefinitely, but only to preserve it until the argument of the case on the writ of error. That there has been no dereliction in the matter becomes apparent when we look at the dates. The opinion of the Court of Appeals was rendered February 4, 1908 (R., top p. 114). Petition for rehearing was denied March 23, 1908 (R., top p. 126). The writ of *certiorari* was filed here April 13, 1908, and was docketed in the clerk's office here June 15, 1908, and proper notice thereof served upon the Attorney-General.

The only question in *The Conqueror* was whether the writ of *certiorari* had been applied for in time. Our application was certainly made in time. There was no occasion for submitting the application to the court prior to the argument of the writ of error, as the writ of *certiorari* was by way of precaution in case jurisdiction on the writ of error failed.

Respectfully submitted,

EDWARD COLSTON,

Attorney for Plaintiff in Error.

JUDSON HARMON,

A. W. GOLDSMITH,

GEORGE HOADLY,

Of Counsel.

December, 1910.

APPENDIX.

(34 Statutes at Large, pp. 607-608.)

Chap. 3594. An act to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart

from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided*, That it shall not be required that sheep be unloaded in the night-time, but where the time expires in the night time in case of sheep the same may continue in transit to a suitable place of unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires.

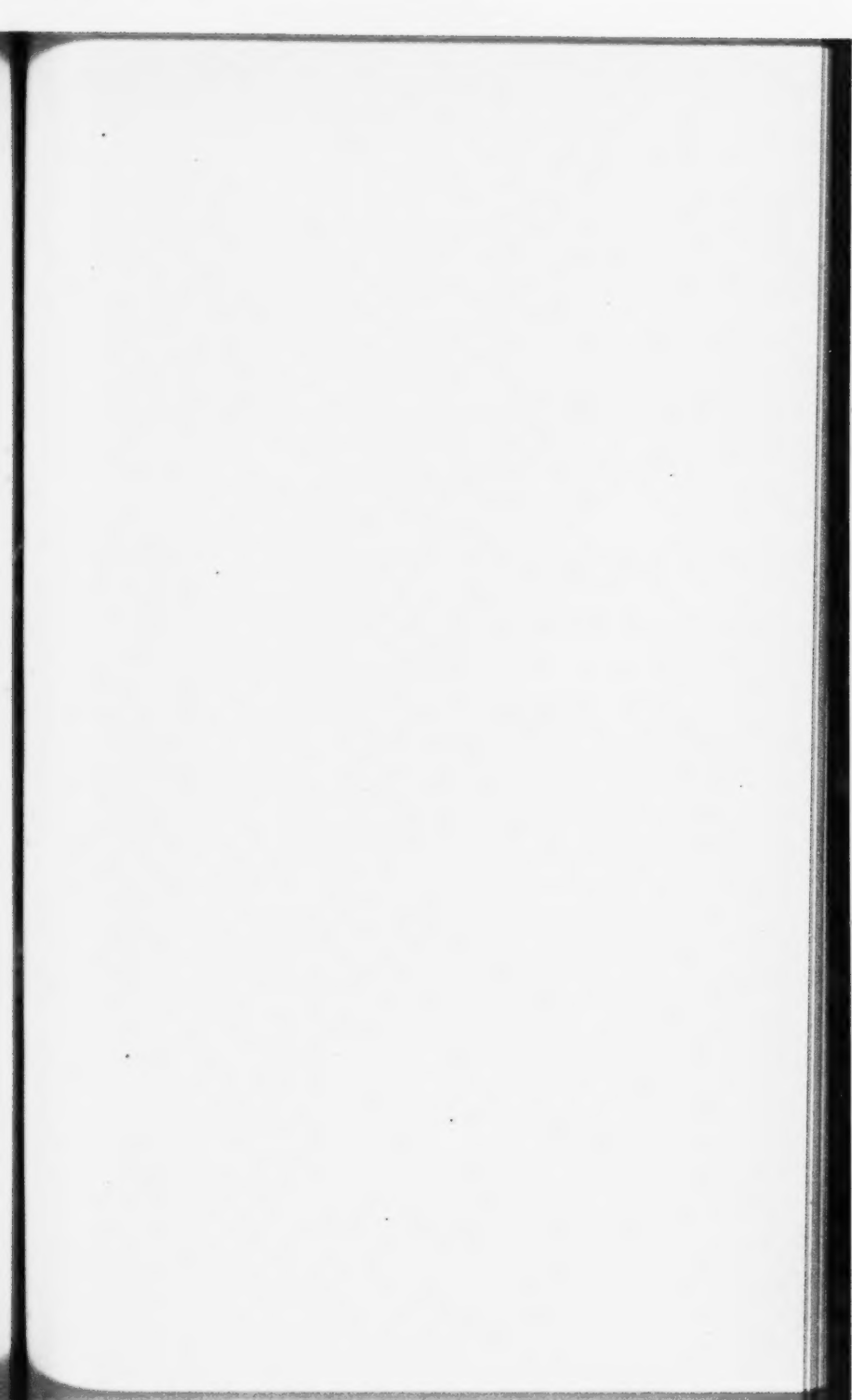
SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such fail-

ure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section, shall be recovered by civil action in the name of the United States in the circuit or district court holden within the district where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906.





Office Supreme Court U. S.

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JAMES H. McKENNEY,
Clerk.

Nos. 7 and 8.

Supreme Court of the United States

OCTOBER TERM, 1910.

**THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,**

Plaintiff in Error,

versus

THE UNITED STATES,

Defendant in Error.

**Citation of Additional Cases by Plaintiff in
Error on Re-Argument.**

EDWARD COLSTON,

Attorney for Plaintiff in Error.

Supreme Court of the United States

OCTOBER TERM, 1910.

THE BALTIMORE & OHIO SOUTHWESTERN RAIL-
ROAD COMPANY,

Plaintiff in Error,

Nos. 7 and 8.

vs.

THE UNITED STATES,

Defendant in Error.

Citation of Additional Cases by Plaintiff in Error on Re-Argument.

In *Sturgis v. Spofford*, 45 N. Y., 446, the question involved was whether by the employment of an unlicensed pilot on boats traversing New York harbor the penalty incurred was a single penalty of \$100, or whether there were as many penalties as there were ships on which the unlicensed pilot acted as pilot. The statute imposing the penalty read as follows:

“All persons employing a person to act as pilot, not holding a license under this act, or under the laws of the state of New Jersey, shall forfeit and pay to the ‘board of commissioners of pilots’ the sum of \$100.”

There had been a recovery below of forty-six penalties of \$100 each, each penalty representing the piloting of a vessel. On the point as to whether it was one offense or more, Chief Justice Church at p. 453 said:

“The act is general in its terms. It is the employment of an unlicensed pilot, for which the penalty of \$100 is incurred. It does not say for each employment, nor for each offense, nor for each ship unlawfully piloted. Penal statutes are to be construed strictly, *and the language will justify the construction that but a single penalty is incurred for all of the alleged unlawful acts of the party prior to the commencement of the action.* ‘All persons employing’ are liable, whether the unlicensed person employed piloted one or fifty ships. It is still but an employment. Prosecutions for aggregated penalties should not be encouraged.”

In *Fisher v. New York Central & Hudson River Ry. Co.*, 46 N. Y., 644, it was held that under a statute providing that any railroad company which should ask and receive a greater rate of fare than allowed by law should forfeit \$50 which sum might be recovered, together with the excess, by the party paying the sum, there could be but one penalty of \$50 recovered, regardless of the number of occasions on which there had been an excessive charge prior to the commencement of suit. At p. 659 Grover, J., delivering the opinion of the court, said:

“My conclusion is, that one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. * * * The idea that a liability to a penalty of \$50 with costs of suit will be insufficient to restrain railroad corporations, is too evidently groundless to require consideration;

but even if sound, the Legislature, and not the courts, must apply the remedy."

In *Parks v. N. C. & St. L. Ry. Co.*, 13 Lea, 1, the question under consideration was whether Section 4927b of the Revised Code of Tennessee imposed a penalty for failure to announce each station at which the train stopped, or only one penalty for each trip the train made. The statute made it the duty of each conductor or other employee of a train to announce the station and the length of the stop to be made thereat. The penalty clause was "upon failure of any railroad company during any trip of the passenger cars to comply strictly with the provisions" of the law the railroad should forfeit the sum of \$100, one-half to go to the person suing and one-half to the school fund. It was held by the Supreme Court of Tennessee, Cooper, J., delivering the opinion, that there was but one penalty for each trip of the train and not a penalty for each station that the conductor had failed to announce.

In *Westfall v. State*, 4 Ga. App., 834 (s. c., 62 S. E. Rep., 558), there was a prosecution for operating freight trains on Sunday through the state of Georgia. On the subject of whether there was one offense or as many as there were trains running on Sunday, the court said:

"We think the running on the same day of six trains may have been well treated as but one offense."

The decisions of the courts depend, of course, upon the phraseology of the particular statute, and in many instances courts have indulged in what might be termed an "unseemly nicety of construction."

In 1868 Queen's Bench had before it, in *Ex Parte Beal*, Law Rep., 3 Q. B., 387, the question whether the forfeit of not exceeding ten pounds to the proprietor of a violated

copyright, imposed by Section 6 of 25 and 26 Vict., c. 68, was for each imitation or reproduction, or only for each sale of imitations or reproductions regardless of the numbers composing such sale. The language of the section (6) made it unlawful to sell "*any copy*," and "for every such offense," the person "shall forfeit a sum not exceeding 10 pounds." In the same section it was also provided that any one who should "import into any part of the United Kingdom" *any* "repetition, copy or imitation," without the consent of the owner of the copyright, "for every such offense shall forfeit a sum not exceeding ten pounds." There were two sales on the same afternoon made by the same person, of two parcels of imitations of certain pictures, one parcel consisting of thirteen copies and the other consisting of a like number. It did not appear whether both sales were made to the same person. One of the questions was as to the number of penalties incurred by the vendor. The court, after referring to the case of *Brooke v. Milbiken*, 3 Term Reports, 509, where it had been held that the penalty was in respect of the act of sale and not of the number of books sold, distinguished the case before them from that one by referring to the difference in phraseology in the two statutes in question. The court thought that to construe the statute under consideration as imposing a penalty only in respect of the sale of imitations regardless of the number so sold, would lead to consequences not intended by Parliament, consequences which the court held would be absurd. The court pointed out that the same section which prohibited a sale of imitations also prohibited an *importation* of reproductions or imitations of copyright pictures without the consent of the copyright owner, and made no difference in the matter of penalty between importation into the Kingdom of such imitations and the sale of them there.

The court further pointed out that a cargo of such imitations might be brought in, and if a penalty of only ten pounds were inflicted it would be well worth while to run the risk of paying such small sum to import and distribute for sale a quantity worth many thousands of pounds. The court said that the Legislature was dealing with an offense which was likely to be committed wholesale.

We can not discover that any of these considerations apply to the interpretation of the statute in the case at bar.

In *Suydam v. Smith*, 52 N. Y., 383, the inspector of turnpikes by authority of statute had ordered the road company to throw open its toll-gates and to take no toll, owing to the company's refusing to put the road in repair, as it had been notified by the inspector to do. Action was brought to recover penalties alleged to have been incurred by taking toll at the gate after the notice aforesaid. Plaintiff obtained a verdict for fourteen penalties amounting to \$140. Plaintiff was the person who paid the illegal tolls. The statute (Section 44, 1 Rev. Stats. New York, revision of 1829, Chapter XVIII., p. 586) provided that:

“Every gate-keeper of a gate ordered to be thrown open * * * who during the time such gate ought to be open shall * * * *take or demand* any tolls from any person passing, shall for *each* offense forfeit the sum of ten dollars to the party aggrieved.”

It was held there was a penalty for each occasion on which the illegal toll was exacted and paid. It is evident that under the terms of the statute the offense consisted, not of failure to throw the pike open for travel without toll, but was the taking of toll from each traveler.

In *Railway Company v. Moore*, 33 Ohio St., 384, there was a statute which provided that any corporation operat-

ing a railroad might demand and receive for the transportation of passengers a fare not exceeding three cents a mile, and that every corporation which should violate the act should "forfeit and pay to the party aggrieved a sum equal to double the amount of the overcharge, but *in no case* shall the amount of the forfeiture be less than twenty-five dollars." The suit was by a passenger who on nineteen distinct rides had been charged and paid a fare in excess of three cents a mile, and he brought suit to recover \$25 for each of the nineteen occasions, making each occasion the subject of a separate cause of action in his petition. Eight of the causes of action were demurred out of the case, and as to the eleven which remained, one of the questions in the case was whether only one penalty or eleven penalties of \$25 each could be recovered. The court, basing its opinion upon particular words of the statute, held there were eleven penalties. Its decision was rested upon those words, which said that *in no case* should the forfeiture be less than \$25. The reasoning was that "in no case" meant "*in no case of overcharge*," and that if the penalty was in no case to be less than \$25 it was to be that much in every case. (See p. 394.)

In *Commonwealth v. Jay Cook*, 50 Pa. St., 201, the statute required, in its first section, brokers and bankers to make a return of the profits of the business, and in the second section, to make a report of the names, place of business, and capital employed, and provided that any broker who should neglect to make the return and report required by the first and second sections of the act should for every such neglect or refusal be subject to a penalty of a thousand dollars. It was held that making a return of profits and report of the names of the members of the firm were distinct and independent acts, and that failure

to do either act would incur the penalty. Speaking on this subject the court said (p. 207):

“Each is indispensable—the report, that it may be known to the commonwealth who is liable to taxation; the return, that the means of assessing the tax may be furnished. The report is once for all time the party may continue in business; the returns annually until he ceases. It is clear that the offenses being different in kind, independent in act, and distinct in time, each is liable to punishment.”

But in the case at bar there are no guiding words in the statute that should lead the court to multiply the penalty by the shipments.

It is more reasonable to take the train load as the unit of offense than the particular shipments of which the train load may be composed, as the following illustration shows:

It often happens that from points west of the Missouri a cattle shipper will have a single shipment that will fill two trains. In such case, if the cattle are confined in the cars beyond the proper statutory period there would be but one offense according to the Government's claim, but two offenses according to the claim of the railroad; an offense committed by each train. Congress looks to the train as the thing that is relied upon to transport the cattle in less than the statutory period of time or to unload them at the end thereof.

Another illustration based on what frequently occurs in the case of small shippers is: the shipper may have two or three carloads of live stock shipped from the same point to the same consignee, and such shipper relies on what is called the “pick up” service of the railroad. One train will pick up one of his cars of cattle, and another

train will pick up another. Under those circumstances there are as many penalties as there are trains. But according to the Government's claim there would be only one penalty because there is only one shipment. The natural and logical unit is the train.

Other cases that may be referred to with advantage are:

Hill v. Williams, 14 S. & R., 287.

Central R. R. v. Green, 86 Pa. St., at p. 431.

Commonwealth v. Borden, 61 Pa. St., 277.

State v. Cleveland, Cincinnati, Chicago & St. Louis Railway Co., 8 Ohio Circuit Court Rep., p. 604.

In this last case the statute required the railway company to place a blackboard in a conspicuous place in each passenger depot, upon which board should be written, at least ten minutes before schedule time of arrival, the fact whether the train was on time or not, and if late, how much. And it was provided:

“That for *each* violation of the provisions of this act such company or persons so neglecting or refusing to comply with the provisions of the act shall forfeit and pay the sum of ten dollars, to be recovered in a civil action.”

It was held that the penalty was for failure to furnish the blackboard, and that the penalty was not to be multiplied by the number of trains whose times of arrival the company failed to record on the board.

Respectfully submitted,

EDWARD COLSTON,
Attorney for Plaintiff in Error.





Office Supreme Court, U. S.

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Nos. ~~12412~~

Supreme Court of the United States

OCTOBER TERM, 1909.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,

Plaintiff in Error,

versus

THE UNITED STATES,

Defendant in Error.

MOTION THAT THE MANDATE ISSUE TO THE
DISTRICT COURT AND DIRECT AFFIRMANCE
OF JUDGMENT IN THAT COURT.

EDWARD COLSTON,

Attorney for Baltimore & Ohio Southwestern Railroad Company.



Supreme Court of the United States

OCTOBER TERM, 1909.

*THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,*

Plaintiff in Error,

Nos. 124-125.

vs.

THE UNITED STATES,

Defendant in Error.

Now comes The Baltimore & Ohio Southwestern Railroad Company, plaintiff in error, and moves the court to remand this case (Nos. 124 and 125) to the District Court of the United States for the Southern District of Ohio with direction that the judgment of that court, entered on October 28, 1907, and as found in the record in this case (see Printed Record, top p. 10) is affirmed, and for further proceedings therein accordingly. The ground of said motion is as follows:

By Section 10 of the act to establish Circuit Courts of Appeals, etc., approved March 3, 1891 (26 Statutes at Large, 829) it is provided that:

“Whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court *to the proper district or circuit court* for further proceedings in pursuance of such determination.”

The effect of this provision is that the judgment under review on this writ of error from this court is a judgment of the district court and not a judgment of the circuit court of appeals; and when the judges of this court hearing said writ of error are equally divided in opinion as to the correctness of said judgment of said district court, it results in an affirmance of that judgment.

In the case of *Panama Railroad Co. v. Napier Shipping Co.*, 166 U. S., 280, where a judgment of a circuit court dismissing a libel had been reversed in the circuit court of appeals and was remanded to the circuit court for the assessment of damages where a decree assessing damages was entered and the case was again appealed to the circuit court of appeals where the damages decree was affirmed, it was held by this court that the entire case was open for review by it, both as to the question of liability and as to amount of damages, and that this court was not limited to a consideration of the amount of damages, which was the only question open in the court of appeals on the second appeal. This court held that it had the right to consider both the question of liability and the question of amount of damages. That right this court would not have had if it had been reviewing merely the decree of affirmance of a United States court of appeals, because that court was precluded on the second appeal from considering the question of liability which had become *res adjudicata* by its decision on the first appeal; and in that case the order of this court was that the first decree of the circuit court, dismissing the libel, be affirmed. (See p. 290.)

It is true that case came to this court on *certiorari*, but we can see no difference, as regards the point we are making, whether the case comes here by *certiorari*, or by writ of error or appeal. The point is that the thing that is

brought here for review, whether the means of bringing it here for that purpose is by *certiorari*, writ of error or appeal, is the judgment of the circuit or district court and not the judgment of the circuit court of appeals.

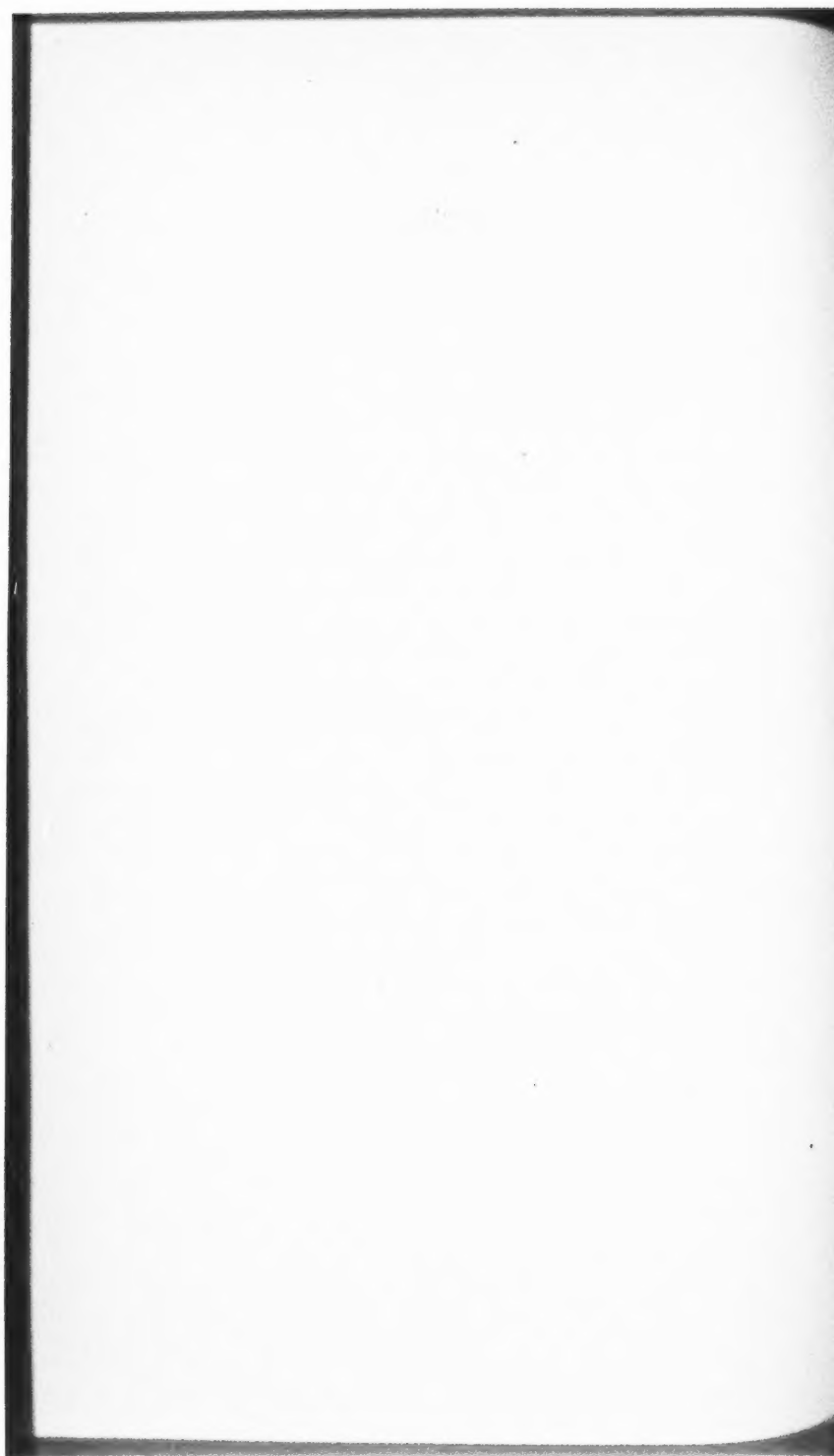
By the so-called Court of Appeals Act the jurisdiction of the United States courts of appeals is made final in the follow instances, viz.: (1) Where the jurisdiction depends upon diversity of citizenship; (2) where a case arises under the patent laws; (3) where it arises under the revenue laws; (4) where it arises under the criminal laws; (5) where it is a case in admiralty; (6) in all other cases where the matter in controversy does not exceed a thousand dollars besides costs. But in all these cases the finality is not really absolute, because this court may take jurisdiction of the same by granting its writ of *certiorari*, and when it does so it reviews and determines the *case* with the same power and authority as if it (the case) had been carried by appeal or writ of error to the Supreme Court. And if, as was decided in the case of *Panama Railway Co. v. Napier Shipping Co.*, *supra*, this court acts upon the judgment of a circuit or district court where the case comes here through the medium of a *certiorari*, it would by the same token act upon the judgment of a circuit or district court and not upon the judgment of the court of appeals where the case comes here by writ of error or appeal from the decision of that court. The result is that the thing affirmed is the judgment of the district court and not the judgment or decision of the United States court of appeals.

Respectfully submitted,

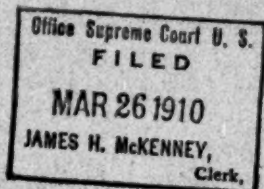
EDWARD COLSTON,

*Attorney for Baltimore & Ohio Southwestern
Railroad Company.*

March 17, 1910.



Nos. **7 & 8**
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Supreme Court of the United States

OCTOBER TERM, 1909.

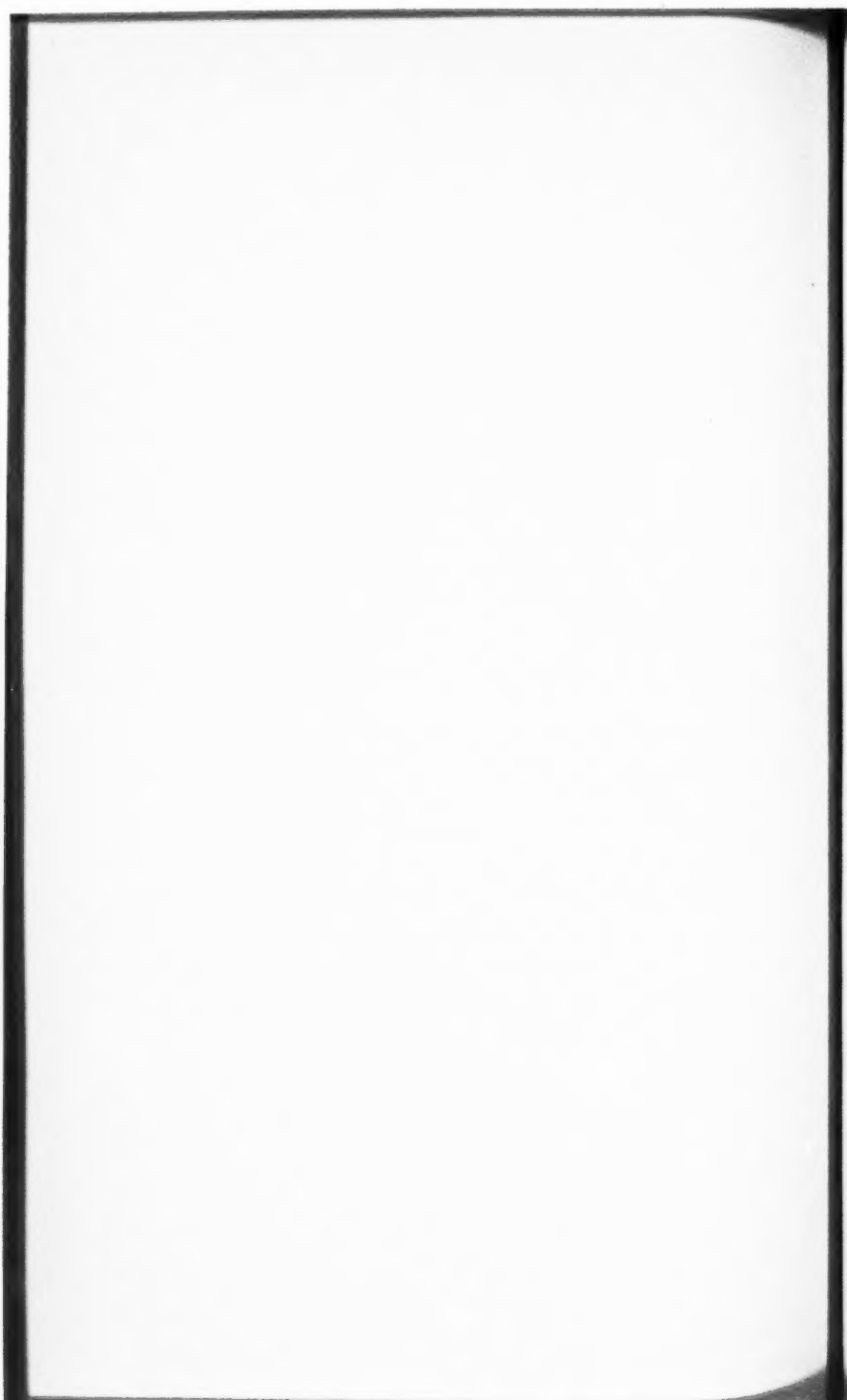
THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,
Plaintiff in Error,

versus

THE UNITED STATES,
Defendant in Error.

Additional Brief on Motion that Mandate to District Court Direct
Affirmance of the Judgment of that Court.

EDWARD COLSTON,
Attorney for Baltimore & Ohio Southwestern
Railroad Company.



Supreme Court of the United States

OCTOBER TERM, 1909.

*THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,*

Plaintiff in Error,

Nos. 124-125.

vs.

THE UNITED STATES,

Defendant in Error.

**Additional Brief on Motion that Mandate to District Court Direct
Affirmance of the Judgment of that Court.**

We beg to submit the following additional considerations which were intended for oral argument, had the rules permitted such argument, as we supposed they did.

The supervisory jurisdiction of this court over the *case* was complete. The whole *case* was removed here from the Court of Appeals by the writ of error. The gateway from the Court of Appeals was thereafter closed, and we can not go back into that field. The matter under review here is not the correctness of the decision of the Court of Appeals, but the correctness of the decision of the District Court.

Section 6 of the Act to establish Circuit Courts of Appeals (approved March 3, 1891, 26 Statutes at Large, 829) provides that it shall be competent for this court to

require, by *certiorari* or otherwise, any such case (a case made final in the Circuit Court of Appeals by the Act) to be certified to this court for its review and determination "with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court"; that is, as said by this court in *The Three Friends*, 166 U. S., p. 49. as if it had been brought directly from the District or the Circuit Court to this court. This we think closes the door upon the Circuit Court of Appeals when once the case has been removed therefrom.

The power conferred upon this court for review and determination of a case pending in the Circuit Court of Appeals "is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised *before* or after any decision by that court and *irrespective of any ruling or determination therein.*" [Italics ours.] *Forsyth v. Hammond*, 166 U. S., at p. 513. And in the case of *The Three Friends*, *supra*, the writ of *certiorari* was issued to the Court of Appeals before there was any decision of that court.

This shows that the review and determination of the case in this court does not involve a review or determination of anything the Court of Appeals may have done or may not have done. The purpose is not to review any act of that court, but to review the case regardless of the acts of that court. This being true as to a case removed from the Court of Appeals by *certiorari*, it is likewise true where the removal is effected by writ of error. The only difference between the two processes is that *certiorari* may issue either before or after a decision of the Court of Appeals; whereas writ of error can be issued only after judgment by that court. When, however, the case has reached this court by writ of error, the

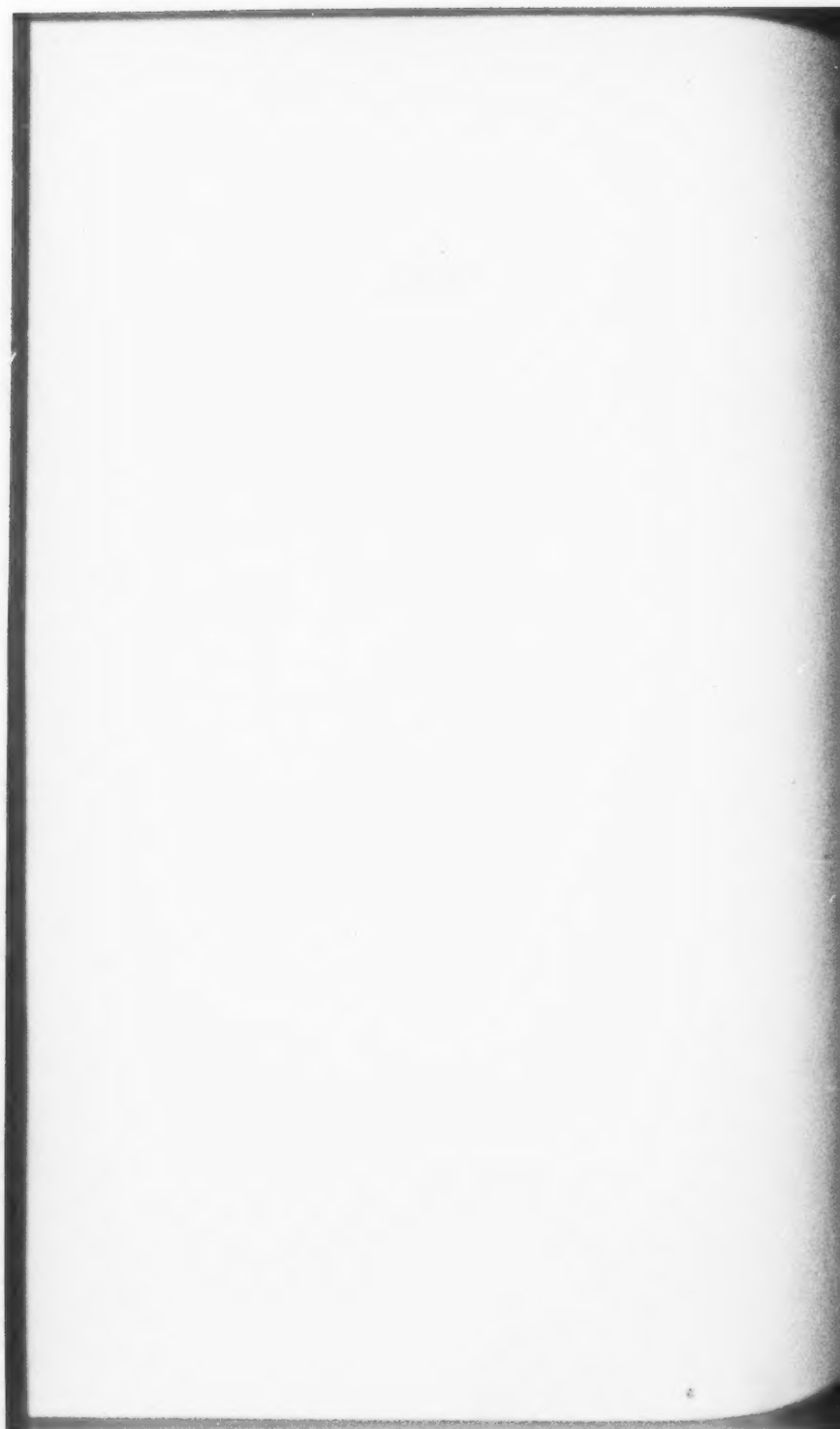
power of this court *over the case* is the same as if it had come here by *certiorari*. Indeed, in defining the power over a case removed from a Circuit Court of Appeals by *certiorari* given to this court, the statute says it shall be “the *same power and authority* in the case as if it had been carried by appeal or writ of error to the Supreme Court”; that is to say, as if it had been brought direct from the Circuit or District Court to this court by writ of error. So that it matters not whether the case comes here by *certiorari* or writ of error, so far as the completeness of the power, authority and jurisdiction of this court over the case is concerned. In either instance what was done or not done in the Court of Appeals is not under review and is immaterial, and is to be regarded no more. The power and authority of this court is exercisable not upon what was done in the Circuit Court of Appeals, for upon that the door is closed, but upon what was done in the Circuit Court or in the District Court, as the case may be.

Respectfully submitted,

EDWARD COLSTON,

*Attorney for Baltimore & Ohio Southwestern
Railroad Company.*

March 23, 1910.





Supreme Court of the United States

OCTOBER TERM, 1909.

THE BALTIMORE & OHIO SOUTHWESTERN
RAILROAD COMPANY,

Plaintiff in Error,

Nos. 124-125.

vs.

THE UNITED STATES,

Defendant in Error.

Petition for Rehearing.

To the Honorable the Supreme Court of the United States:

Ordinarily we would not presume to ask a rehearing of a case on the ground that the court is equally divided on the question of affirmance or reversal of a judgment, for if that could be a ground for rehearing in every case, the disability of a single member of this court would obstruct much of its business. But the present case presents a peculiar situation. This court being equally divided upon the construction of a statute of the United States under which questions must be arising with great frequency, it leaves the inferior courts of the United States not only without a guide, which condition existed before, but really in the dark. The equal division of this

court operates necessarily as a disapproval by four judges of this court of the result reached by the Circuit Court of Appeals, and of its reasoning. Thus a condition is created likely to produce unfortunate confusion and contrariety of decision in the future. For it is obvious that the decision of the Court of Appeals for the sixth circuit derives no sustenance from the decisions of the Court of Appeals in *N. Y. C. & H. R. R. Co. v. United States*, 165 F. R., 833, and *United States v. N. Y. C. & St. L. Ry. Co.*, 168 F. R., 699, for those decisions are merely built upon the decision made in the sixth circuit, without independent support or merit of their own. We therefore venture to suggest that further argument or further reflection might lead to a change of view favorable to our contention, or possibly the court might order a reargument before the full bench.

For these reasons we ask that this petition for rehearing be allowed, in case our motion for affirmance of the judgment of the District Court be not granted.

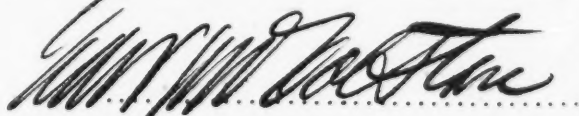
Respectfully submitted,

EDWARD COLSTON,

*Attorney for Baltimore & Ohio Southwestern
Railroad Company.*

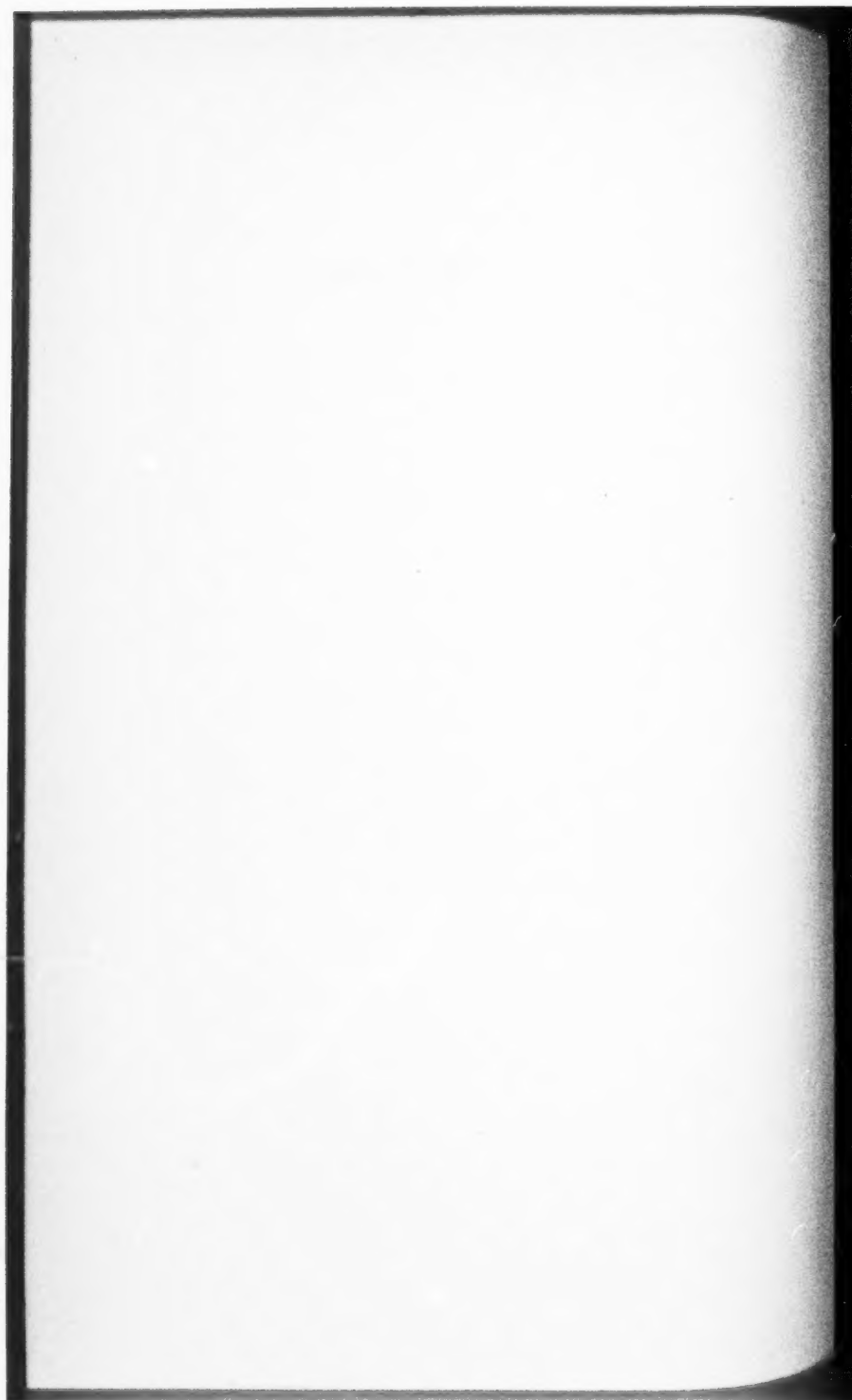
March 23, 1910.

I certify that the foregoing petition for rehearing is in my opinion well founded and is presented in good faith.



*Counsel for the Baltimore & Southwestern
Railroad Company.*





In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE BALTIMORE AND OHIO SOUTHWEST- ern Railroad Company, Plaintiff in error,	}	No. 124.
<i>v.</i> THE UNITED STATES.		

THE BALTIMORE AND OHIO SOUTHWEST- ern Railroad Company, Plaintiff in error,	}	No. 125.
<i>v.</i> THE UNITED STATES.		

BRIEF FOR THE UNITED STATES.

STATEMENT.

As there is question of the jurisdiction of this court, plaintiff in error filed in the office of the clerk of this court, on June 15, 1908, a petition for a writ of certiorari in these two cases, asking that "in case this court should find that the matter in controversy does not exceed \$1,000 besides costs, the jurisdictional amount required by the last paragraph of section 6 of the Court of Appeals act," then this court take jurisdiction by certiorari. No notice, however, of an application to the court for certiorari

seems to have been served upon the United States; and, certainly, the petition which plaintiff in error filed has never been submitted to the court. The judgments of the Court of Appeals for the Sixth Circuit which it is sought to have reviewed were rendered on February 4, 1908 (Rec. 114).

As respects the jurisdiction upon the writs of error, I shall pass the question whether the consolidation of the eleven like actions against plaintiff in error, under the consolidating order made by the District Court (Rec., 32), united the eleven actions into a single action with eleven counts in the petition, or merely combined the suits for a single trial; and I do this because the stipulation made between the United States and plaintiff in error in the Circuit Court of Appeals seems of itself to dispose of the jurisdictional inquiry. This stipulation reads:

It is agreed by and between the parties to these suits that in the hearing of these causes, the same being numbered 1866 and 1867, respectively, in the District Court, the remaining causes consolidated with said cause No. 1866, to wit: Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884, in the District Court, shall be controlled and disposed of in accordance with the decision of the Circuit Court of Appeals rendered in causes numbered 1770 and 1771, and that certified copies of the records in said causes Nos. 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1880, and 1884, shall be filed in the Circuit Court of Appeals, as part of said cause No. 1770 in said court, but not

printed, and counsel shall have the privilege to refer to and use any part of said record as they may desire (Rec., 31).

Cases 1866 and 1867 in the District Court were numbered 1770 and 1771 in the Circuit Court of Appeals, and are the cases here at bar.

ARGUMENT.

I shall make the following points:

I. As the parties to this litigation by stipulation agreed that the nine actions other than the two cases at bar should be "controlled and disposed of in accordance with the decision of the Circuit Court of Appeals" in the two cases now at bar, plaintiff in error has waived any right to have the outcome of such other nine cases affected by proceedings of any kind in this court. The result is that, at most, the two penalties imposable upon plaintiff in error in the two cases at bar are the matter in controversy in this court; those penalties, having each a statutory maximum of \$500, can not aggregate more than \$1,000; and therefore "the matter in controversy" does not "exceed \$1,000 besides costs," and this court is without jurisdiction.

II. A writ of certiorari should not issue, both because timely application was not made to this court by plaintiff in error and because the case is not of a character to deserve the writ.

III. The unit of offense under the twenty-eight-hour law (34 Stat., 607) for unlawfully confining live stock or unlawfully failing to feed or water them

is not the train, however many separate shipments it carries, but is the shipment itself; and consequently eleven penalties are properly chargeable against plaintiff in error for its mistreatment of the eleven different shipments of live stock involved in this litigation.

Of these briefly:

I.

As the parties to this litigation by stipulation agreed that the nine actions other than the two cases at bar should be "controlled and disposed of in accordance with the decision of the Circuit Court of Appeals" in the two cases now at bar, plaintiff in error has waived any right to have the outcome of such other nine cases affected by proceedings of any kind in this court. The result is that, at most, the two penalties imposable upon plaintiff in error in the two cases at bar are the matter in controversy in this court; those penalties, having each a statutory maximum of \$500, can not aggregate more than \$1,000; and therefore "the matter in controversy" does not "exceed \$1,000 besides costs," and this court is without jurisdiction.

Section 6 of the Evarts Act limits this court's jurisdiction in review of the Circuit Courts of Appeals on writ of error to cases where "the matter in controversy shall exceed \$1,000 besides costs" (26 Stat., 828, ch. 517).

The stipulation, quoted on page 2, *ante*, made the claims of penalty in nine of the eleven cases brought against plaintiff in error in the District Court depend

upon the outcome of the two cases now at bar in the Circuit Court of Appeals (Rec., 31). The language is that those nine claims should "be controlled and disposed of *in accordance with the decision of the Circuit Court of Appeals*" rendered in the two cases brought to this court. This puts nine of the penalties, even if a penalty is obtainable for mistreatment of each shipment, beyond the reach or influence of any judgment of this court. The stipulation did not make recovery of the penalties in the nine cases other than Nos. 1866 and 1867 (i. e., 1770 and 1771 in the Court of Appeals) depend upon the "final outcome" of or "final judgment" in the two latter cases; nor did it make the nine cases or claims "abide the result" of the litigation as to the other two cases or claims. Instead of that, it distinctly and unmistakably governs the nine cases or claims by the outcome in the Circuit Court of Appeals. This is an agreed waiver by both sides of any right of litigation in this court as to nine of the eleven demanded penalties.

The amount in controversy in a case is not measured by the full amount of plaintiff's claim when defendant admits or agrees to a part of it, but is measured by the excess of plaintiff's claim above what defendant admits or acquiesces in.

Jenness v. Citizens Nat. Bank of Rome, 110 U. S., 52.

Hilton v. Dickinson, 108 U. S., 165.

Gorman v. Havird, 141 U. S., 206.

And the matter in dispute is the amount involved in the writ of error—not necessarily the same as was involved below.

Gordon v. Ogden, 3 Pet., 33.

The amount in dispute may, and must, be determined from the whole record.

Bowman v. C. & N. W. Ry. Co., 115 U. S., 611, 613.

In consequence of the stipulation, the only penalty claims which the judgment of this court can affect are the two in cases 1866 and 1867 (being 1770 and 1771 in the Circuit Court of Appeals). The maximum penalty allowable on each of these claims is \$500 (sec. 3 of the act involved in this case and quoted at the end of plaintiff in error's brief). More than \$1,000, therefore, does not depend upon the outcome in this court, and so this court is without jurisdiction.

II.

A writ of certiorari should not issue; both because timely application was not made to this court by plaintiff in error and because the case is not of a character to deserve the writ.

1. As already stated, the petition for certiorari which plaintiff in error filed in the office of the clerk of this court on June 15, 1908, has never been submitted to this court for action thereon. No motion or application for allowance of the writ has yet been made. A party can not, by merely filing a petition with the clerk and then lying by, preserve indefinitely his opportunity for asking a certiorari

in avoidance of the rule that, in analogy with the statutory limitation to one year of the time for suing out a writ of error or taking an appeal, a petition for certiorari must be presented likewise within one year.

The Conqueror, 166 U. S., 110, 114.

The judgments of the Circuit Court of Appeals which it is sought to review were rendered February 4, 1908 (Rec., 114).

2. This case is not of such character as to deserve the writ of certiorari. As will be seen in the course of the treatment of the merits, three Circuit Courts of Appeals (viz, for the First, Second, and Sixth Circuits) and two District Courts (viz, for Oregon and Northern Illinois) have concurred in interpreting the twenty-eight-hour law as making a separate shipment the unit of offense against the law. No court has decided to the contrary. Further, the merits in this case do not relate to any question of the shipper's right or of the carrier's duty under the statute, but pertain merely to the amount of punishment which may be put upon the carrier for an admitted violation of the statute. That question is of much practical importance, undoubtedly, in its influence upon the willingness of a carrier to please many shippers through disobedience of the law at small cost, but it is hardly of a kind to induce exceptional intervention by this court in advance of any conflict in the lower courts.

III.

The unit of offense under the twenty-eight-hour law (34 Stat., 607) for unlawfully confining live stock or unlawfully failing to feed or water them is not the train, however many separate shipments it carries, but is the shipment itself; and consequently eleven penalties are properly chargeable against plaintiff in error for its mistreatment of the eleven different shipments of live stock involved in this litigation.

Several routes lead to this conclusion.

1. The statute, quoted in full at the end of plaintiff in error's brief, denounces two different things, if not more; and each of these denouncements is quite independent of the operation of a train. In the first place, the act says that no carrier of live stock in interstate commerce "*shall confine the same * * * without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of at least five consecutive hours*" (sec. 1); and, in the second place, the act says that the "*animals so unloaded shall be properly fed and watered during such rest*" (sec. 2). There is an offense if live stock are not seasonably unloaded; and there also is an offense if live stock, though unloaded, are not fed and watered. The unit of offense surely is the same as to both these kinds of offense; and the offense of not unloading may often happen without the live stock having been in any train at all, and the offense of not feeding and watering after unloading will always happen when the live stock are not in a train.

Suppose cattle are loaded into cars by the carrier and kept there more than twenty-eight hours without unloading before the cars are put into any train. There is an evident offense. Is the train the unit of offense, though there has been no train? Is not the shipment necessarily the unit of offense in such case? And, if so, is the shipment any less the unit of offense when the cars have gone into a train?

Suppose, next, that after cattle have been loaded in a train the cars containing them are side-tracked and left behind and the cattle stay in the cars without unloading for an undue period. There is again an evident offense. The cattle are not in a train, however, when the offense arises. Is a train the unit of offense in such case? Is not the shipment the necessary unit, unless each head be considered a unit?

Suppose, still further, that after cattle have been seasonably unloaded from a train they are not fed and watered as required by section 2 of the act. There is a palpable offense, but the cattle are not in a train. Is not the shipment the unit of offense?

These things show that the statute does not bear upon the operation of a train in one or another way, but deals directly and independently with the treatment of live stock in respect of their seasonable unloading and their proper feeding. Indeed, the word "train" does not once occur in the act.

2. The limit of time within which unloading may be withheld varies with different shipments, according to the wish of the owner of the shipment, being

twenty-eight hours unless the owner consents that it may be thirty-six hours. Section 1 declares on this subject: "That upon the written request of the owner or person in custody of *that particular shipment*, which request shall be separate and apart from any printed bill of lading or other railroad form, the time of confinement may be extended to thirty-six hours." The owner's consent affects his shipment, and only his shipment, whether it is in a train with other shipments of live stock or not; and the result is that the rule of conduct for the carrier varies as to different shipments. The shipment being the unit as to which the carrier's conduct is prescribed by statute, it must equally be the unit of the carrier's misconduct through violation of the prescribed rule of conduct concerning the shipment.

The operation of this special statutory clause as to extension of the time of confinement in the case of any particular shipment is really conclusive on the whole matter, because it shows that different shipments are separate things in relation to the conduct required of the carrier, and therefore must be separate things in relation to the carrier's misconduct.

3. The position of plaintiff in error, that there can be only one offense against the statute through operating a single train (however many shipments of live stock it may contain), comes necessarily to the claim that proper treatment of the train as a

single whole is what the statute requires, instead of the proper treatment of each shipment. This contention that the train is to be viewed as an integer leads to a palpable dilemma—

Either the owners of *all* shipments in the train must consent before *any* shipment can be properly confined for thirty-six hours (which obviously contradicts the statutory privilege of the owner of any "particular shipment") or the owner of *any* shipment in the train may extend the thirty-six-hour rule to *all* other shipments in the train without the consent of the owners of such other shipments (which, again, obviously violates the statutory control of each shipper over his own shipment); or, finally, we have the case of a train which, though being a single thing, whose management the statute regulates as an entirety, may nevertheless contain different parts, viz, separate shipments, which are governed by different rules, viz, some by the twenty-eight-hour and others by the thirty-six-hour limit of confinement. It is impossible that the train can be the legal unit with reference to which given conduct is required of the carrier and opposed conduct is forbidden when the law applies different rules to separate parts of the train, i. e., separate shipments hauled in it.

4. Certain special cases may be instanced to show the absurdity of the train-unit rule for which plaintiff in error contends.

Consider a train which runs over the Union Pacific road from Omaha to San Francisco, let us say,

in seventy-two hours. In the first twenty-nine hours the carrier violates the statute by carrying cattle on this train without unloading them. Can it *after that twenty-nine-hour period* take on any number of new shipments of cattle and carry each of these new shipments for any length of time in violation of the statute without the carrier's incurring any penalty beyond that for its offense during the first twenty-nine hours? Have the later shipments, which come into the train after the law has already been violated, no rights whatever under the statute? Such must be plaintiff in error's contention. In its theory the train, so to speak, gets immunity for subsequent wrongs by having already done one wrong.

Consider again that a single shipment of cattle goes from Omaha to San Francisco over the Union Pacific; that it is not unloaded for twenty-eight hours after starting from Omaha; and that, after the occurrence of such complete offense on one train, the shipment is carried forward without unloading by other trains. Are there as many offenses as trains that carry the single shipment?

Again, suppose that the eleven shipments involved in this litigation had been forwarded by plaintiff in error on eleven different trains, each carrying one shipment. There would then be eleven separate offenses, in plaintiff in error's own view. Why fewer because the eleven shipments are forwarded in one train?

5. The decisions of the lower Federal courts upon the question in hand may be put into two groups of (1) decisions under the act of June 29, 1906—the present law—and (2) the decisions under Revised Statutes, sections 4386–4390, which were repealed by section 5 of the present law.

(1) The decisions as to the present law are unanimous on the point in hand, and have been made by the Circuit Courts of Appeals for the First, Second, and Sixth Circuits and by the District Courts for Oregon and Northern Illinois.

N. Y. Central & Hudson River R. R. v. United States, 165 Fed., 833, 843.

United States v. N. Y. C. & St. L. Ry. Co., 168 Fed., 699.

B. & O. Southwestern R. R. Co. v. United States (Rec., 115–119).

United States v. Oregon Ry. & Nav. Co., 163 Fed., 640, 642.

United States v. A., T. & S. F. Ry. Co., 166 U. S., 160, 164.

(2) The only decisions found under the prior law are:

United States v. Boston & Albany R. R. Co., 15 Fed., 209.

United States v. St. L. & S. F. Ry. Co., 107 Fed., 870.

Each of these two cases involved only a single shipment; neither presented, nor did either purport to decide, the question whether the shipment or the train is the statutory unit.

In *United States v. St. L. & S. F. Ry. Co.* the court expressly said: "So that it is manifest that the different cars described in the separate paragraphs of the complaint constituted one train, and that *the shipment of cattle was one shipment*" (p. 871). The specific decision in that case was that the carload is not the unit of offense. In *United States v. Boston & Albany Ry. Co.* the specific decision was that the individual head of live stock is not the unit of offense.

Further, the provision of the present law which allows the shipper to vary the permitted period of confinement of his shipment did not exist in the earlier statutes.

CONCLUSION.

The writs of error should be dismissed; and otherwise the judgments of the Circuit Court of Appeals for the Sixth Circuit should be affirmed.

LLOYD W. BOWERS,
Solicitor-General.

JANUARY, 1910.

O





In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE BALTIMORE AND OHIO SOUTHWESTERN Railroad Company, plaintiff in error, <i>v.</i> THE UNITED STATES.	}	No. 7.
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THE BALTIMORE AND OHIO SOUTHWESTERN Railroad Company, plaintiff in error, <i>v.</i> THE UNITED STATES.	}	No. 8.
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SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

The statute here involved is act June 29, 1906, c. 3594; 34 St. L., 607, being the so-called "28-hour law" for regulation of shipments of cattle.

A copy of the full text of the statute is annexed as Schedule C.

The question in short is this:

Can the Government recover a separate penalty in each of the eleven cases contained in the record, or only one penalty covering them all?

Each of the eleven cases claims a separate violation of the act.

It is urged that only one penalty can be imposed because all of the eleven shipments had been collected into and were transported as one train.

ARGUMENT.

Of course this brief is not intended to be a substitute for the brief filed by the late Solicitor General on the original argument in which, with the masterly lucidity characteristic of him, he argued the jurisdictional question and in five pages presented the most forceful among the considerations supporting the Government's position on the merits. These considerations are not repeated here, but certain additional points are presented which Mr. Bowers did not think it necessary to advance on that argument. These additional points are as follows:

The unit of offense under this act is not a continuing "confining cattle" in general, but it is the distinct "failure" to unload, feed, water, and rest such cattle as shall then and there have completed 28 hours of confinement. It is for "every such failure" that the statute provides a penalty.

In nine of the eleven cases the failures to unload, etc., were separate offenses because they occurred at distinct times and places.

In all of the eleven cases the failures to unload, etc., were separate offenses because the statute intended that the mistreatment of cattle of different shipments should be separate offenses.

The alleged mechanical inconveniences of operating trains under the shipment theory of this statute can be and in practice have been surmounted, and in any event they could not override the intention of Congress.

The trainload theory has no affirmative recognition in the statute, and not even practical railroad administration requires it. Furthermore, it would tend to make the statute ineffective because the penalty which it would provide is so small.

FIRST.

The construction accepted by the Court of Appeals is the only one which has received any substantial support from the lower courts.

Four theories as to the unit of offense have been suggested from time to time. They are: The individual animal, the carload, the trainload, and the shipment.

The individual-animal theory appears to have no support in the language of the act, and it was early rejected by the case of *U. S. v. Boston & Albany R. Co.* (15 F. R., 209) (Nelson, J.), a decision made under the predecessor statute and presumably adopted by the reenactment.

The carload theory was rejected by *U. S. v. St. Louis & San Francisco R. Co.* (107 F. R., 870) (Rogers, J.), which likewise was decided under the predecessor statute and was presumably adopted by the reenactment. Indeed what change was made by the new statute tended more clearly to exclude this theory.

The trainload theory has had no substantial support in the lower courts, though the *St. Louis & San Francisco* case, *supra*, is urged as having supported it. That case, however, involved a trainload which

was also a single shipment, and therefore did not decide as between the two.

The shipment theory has been upheld by all the courts in which it has been involved excepting the District Court below.

The Circuit Court of Appeals for the Sixth Circuit decided the case below in a very carefully considered and unanimous opinion. *United States v. Baltimore and Ohio Southwestern Railroad Co.*, 159 F. R., 33 (Rec. 115-119).

The Circuit Court of Appeals for the Second Circuit unanimously followed the decision below, saying, "*We concur in its reasoning and conclusion.*" (*U. S. v. N. Y., C. & St. L. R. Co.*, 168 F. R., 699.)

The Circuit Court of Appeals for the Ninth Circuit held the same way on independent consideration, saying in its opinion that it found "*controlling reason for so holding in the proviso of section 1*" (concerning the written request). *Southern Pacific Co. v. U. S.*, 171 F. R., 360, 363, affirming 162 F. R., 412 and also in effect 157 F. R., 459.

The Circuit Court of Appeals for the First Circuit followed the principal case without, however, particular original consideration, merely saying that they considered the true construction of the statue to be a matter of doubt. *N. Y. Central & H. R. R. v. U. S.*, 165 F. R., 833, 843, affirming the judgment below.

In *United States v. Oregon R. R. & Nav. Co.*, 163 F. R., 642 (Circuit Court, District of Oregon), the court (Wolverton, district judge) followed the case

below, saying that it was "*impressed with its soundness.*"

In *United States v. Atchison, T. & S. F. R. R. Co.*, 166 F. R. 160 (District Court, N. D. Ill., E. D.), the court (Landis, district judge) held the same way upon original consideration of the principle and without citing the case below.

SECOND.

The unit of offense under the act is not a continuing "confining cattle" in general, but it is the distinct "failure" to unload, feed, water, and rest whatever cattle shall then and there have completed 28 hours of confinement. It is for "every such failure" that the statute provides a penalty.

The basis of the reasoning advanced is, if I understand it, the proposition that these various matters charged in these various cases are merely indivisible portions of a single fluent, continuing offense. The theory is that the offense created by the statute is an offense of "confinement of cattle;" (Brief on reargument, p. 8) meaning, apparently, a general progressive, fluent, continuing, indeterminate confinement.

On the contrary, the confinement criticized by the statute is not confinement in general or confinement in a train, but confinement-for-more-than-28-hours-exclusive-of-time-of-loading-and-unloading. It is a distinct section of time and each such section is considered by the statute as a separate occurrence of the evil.

Indeed, to speak with more precision, the offense for which the statute provides the penalty is not even

this offense of more-than-28-hour-confining, but an offense of *failing* at the *end* of 28 hours to unload, water, feed, and rest such cattle as up to that time shall have been confined for that period. Thus the incidence of the penalty is defined as follows:

SEC. 3. That any railroad * * * who knowingly and wilfully fails to comply with the provisions of the two preceding sections [i. e., who fails to unload for rest, water, and feeding at the end of 28 hours' confinement] shall *for every such failure* be liable for and forfeit and pay a penalty.

It is true that the confining of cattle even up to 40 hours would be only one offense; but plainly *every* entire 28 hours would define a new offense.

The cases at bar are therefore very different from the "continuing offense" line of cases, as is well illustrated by *In re Snow* (120 U. S., 274). That case involved prosecution under a statute which provided as follows:

Section 3. That if any male person hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor and on a conviction thereof shall be punished. * * *

The statute fixed no length of time of the cohabiting. The defendant was indicted by the same grand jury at the same time in three separate indictments each charging him with the offense of cohabiting with more than one woman, to wit, with seven women, and each indictment charged the same seven women. The three indictments were identical ex-

cepting that they cut up into three arbitrary successive periods, the time during which the defendant had theretofore been cohabiting. The court held that these three indictments charged only one offense because the offense was continuous in its character. If, however, the statute had made it a separate offense to "cohabit with more than one woman" *for 28 hours*, and if each indictment had covered a different period of 28 hours, it seems perfectly plain that the decision would have been different; and it is clearer still if the offense had been *a failure to stop such cohabitation after a specified length of time*.

In his opinion in the *Snow* case Mr. Justice Bradley fully explains (p. 286) the principle of continuing offenses and discusses at length the case of *Crepps v. Durden*, Cowper, 640 (which is relied on by the plaintiffs in error here), quoting from that case Lord Mansfield's analysis, which was as follows:

On the construction of the act of Parliament the offense is "*exercising his ordinary trade upon the Lord's day;*" and that without any fractions of a day, hours, or minutes. It is but one entire offense, whether longer or shorter in point of duration; so, whether it consists of one or of a number of particular acts, the penalty incurred for this offense is 5 shillings. There is no idea conveyed by the act itself, that, if a tailor sews on the Lord's day, every stitch he takes is a separate offence; or, if a shoemaker or carpenter work for different customers at different times on the same Sunday, that those are so many separate and dis-

tinct offenses. There can be but one entire offense on one and the same day. And this is a much stronger case than that which has been alluded to, of killing more hares than one on the same day. Killing a single hare is an offense; but the killing of 10 more on the same day will not multiply the offense, or the penalty imposed by the statute for killing one. Here repeated offenses are not the object which the legislature had in view in making the statute; but singly, to punish a man for exercising his ordinary trade and calling on a Sunday.

The court also discussed as follows two illuminating Massachusetts decisions:

The case of *Commonwealth v. Connors* (116 Mass., 35) gives no support to the view that a grand jury may divide a single continuous offense, running through a past period of time, into such parts as it may please, and call each part a separate offense. On the contrary, in *Commonwealth v. Robinson* (126 Mass., 259) it is said that the offense of keeping a tenement for the illegal sale of intoxicating liquors on a day named, and on divers other days and times between that day and a subsequent day, is but one offense, even though the tenement is kept during every hour of the time between those two days, such offense being continuous in its character (p. 286).

But if each item of an illegal doing of business is made a separate offense, penalties may be recovered for each. Thus, where a statute made every

sale of uninspected beer a crime, each sale is held to be a separate offense.

State v. Broeder, 90 Mo. App., 169.

State v. Heard, 107 La., 60.

State v. Shafer, 20 Kans., 226.

Benson v. State, 44 S. W. R., 168 (Tex. Cr. App., 1898).

This court again analyzed the true nature of continuing offenses in *Armour Packing Co. v. United States* (209 U. S., 56), which involved the continuing offense of "transporting" goods at less than the published rates, as distinguished from the offense of "receiving a rebate." The case at bar falls the other side of this line of distinction, because the offense here is not an offense of "transporting" improperly confined cattle, but of failing to unload, feed, water, and rest them at certain specific times.

The cases which, under appropriate statutes, hold that such items of action, even though coincident or concurrent or similar, are, nevertheless, separate offenses, are even more clearly illustrated by the following cases, which are close in line with the case at bar:

U. S. v. St. Louis Southwestern R. Co. (C. C. A., 5th C.), decided December 13, 1910, under the safety appliance act. That act provides that "it shall be unlawful for any such common carrier to haul * * * any car * * * not equipped with, etc.," and that "any such common carrier * * * hauling * * * any car in violation of * * * this act, shall be liable to a penalty of one hundred

dollars *for each and every such violation.*" The court held that there was a separate violation as to each of the three cars moved though they were in one train and one movement. In this case the fact was also noticed that the statute creates no criminal offense, and therefore is not governed by rules of construction of criminal statutes.

In *People v. N. Y. Central R. Co.* (13 N. Y., 78) the statute required railroad trains to signal at crossings and fixed a penalty "for every neglect of this provision." It was held that a separate offense occurred at every crossing, even though on a single train journey.

In *Chic. & c., R. Co. v. People* (82 Ill. App., 679) the statute prohibited the obstruction of a highway and fixed a penalty "for each such offense." A single train extended across and obstructed several highways. It was held a separate offense for each such highway.

In *So. R. Co. v. State* (165 Ind., 613) the statute required the railroad company to register on a station blackboard the time of expected arrival of the trains at that station, and fixed a penalty "for each such violation." It was held a separate offense for each failure to register.

So here, the statute makes *each failure* a separate offense, and not the whole series.

THIRD.

In nine of the eleven cases the failures to unload, etc. were separate offenses because they occurred at distinct times and places.

On the theory of this brief, the punishable failures of duty occurred at the completion of 28 (or 36) hours from the loading of each lot of cattle, and wherever those cattle at that time were. Schedule A hereto annexed analyzes the various lots and shows that these times (and therefore places) were different as to nine of the lots; that is, as to nine of the cases.

I.

Failures to perform statutory obligations are separate offenses if they occur either at different times or different places.

If this is so it will not be claimed, I suppose, that the Government can not collect separate penalties under this statute for "every such failure," as the statute expressly says.

All the authorities collected on the brief submitted for plaintiff in error recognize the following distinction:

A single act or omission denounced by the statute occurring at a single time and place constitutes only one offense, no matter how many items it may affect unless perhaps, as in larceny cases, they belong to different owners.

But if there are different (or even similar) acts or omissions *at different times and different places*, then there are different offenses.

The case of *Nichols v. Commonwealth* (78 Ky., 180), (brief of plaintiff in error on reargument, p. 30) illustrates exactly both wings of this distinction. The taking of the chicken and geese some of which belonged to Mrs. Thorns and some to Grigsby was held to be only one offense, because it was one asportation at one time from one place; whereas the taking of the chicken and geese which belonged to Brooks was separate from this offense, because it was another asportation, occurring at another time, and from a place 200 yards away.

So here the unlawful omission to unload and feed *Sam Chapman's* cattle occurred on February 3, at 5.45 p. m., wherever the train then was; while the unlawful omission to unload and feed *Oder's* cattle did not occur until 10 a. m. on the next day, not merely 200 yards but over 16 hours' railroad journey away.

Again in *U. S. v. Patty* (2 F. R., 664), (brief of plaintiff in error on reargument, page 35) both classes of cases on the same line of distinction are illustrated. A certain count of an indictment charged the unlawful mailing of a large quantity of letters but all at the same time and place and by the same act and this count was held to charge only one offense; another count charged unlawful mailing of several quantities of letters on different days by different acts, and this count was held to charge more than one offense and therefore to be void for duplicity.

The law appears to be uniform on this line of cleavage.

If, for instance, the defendant by two strokes or shots injures two persons, there are two offenses. even though there was only one brawl;

Flemister v. U. S., 207 U. S., 373.

State v. Temple, 194 Mo., 228.

Augustine v. State, 41 Tex. Cr. R., 59.

Kelly v. State, 43 Tex. Cr. R., 40.

People v. Ocholski, 115 Mich., 601.

Baker v. Com., 20 Ky. Law R., 879.

12 Cyc., 289.

but where defendant by *the same shot* wounded four fishermen seated around a camp fire, it was held to be only one crime.

Sadberry v. State, 39 Tex. Cr. R., 466.

12 Cyc., 289.

So where a defendant made several counterfeits at different times, though of the same series and from the same plates, there were different offenses;

Bliss v. U. S., 105 F. R., 508 (C. C. A. 1st C.).

U. S. v. Radenbush, 8 Pet., 288.

but there is only a single offense in possessing two counterfeiting plates at the same place and time, where the two plates are so connected that possessing one necessarily involves possessing the other.

U. S. v. Miner, 11 Blatch., 511; 26 Fed. Cas., No. 15780.

A refreshing and illuminating case is *Miller v. State* 72 S. W., 856 (Tex. Cr. App., not reported by the State), where the defendant played poker in the morning, "went broke," and quit the game. In the afternoon of the same day he returned and

played again. He was held to have committed two offenses of gambling.

In *Collins v. State* (39 Tex., Cr. R., 30) the defendant slandered P. and also M. in the same conversation and at the same place and before the same hearers. As, however, the two slanders were by different language, they were held to be two offenses.

In *Stevens v. State* (58 S. W., 96; Tex. Cr. App., not reported by the State) it was held that there were two offenses of stealing cattle where the cattle concerned was stolen at different places even though on the same roundup.

In cases involving the crime of unlawfully receiving deposits in an insolvent bank, each separate deposit is held to be a separate offense.

State v. Burlingham, 146 Mo., 207.

Com. v. Hazlett, 16 Pa. Super. Ct., 534.

Com. v. Rockafellow, 3 Pa. Super. Ct., 588.

II.

The failures to unload charged in nine of the eleven cases all occurred at separate times and places.

A. The time which the statute undertakes to count (up to 28 hours) is the time of the *confinement* of cattle *in cars* and the time at which the statute begins the count of the 28 hours is the completion of the loading of the shipment and not the final mobilization of the train.

The statute says nothing at all about trains. It says:

No railroad * * * shall confine the same
in cars * * * for a longer period than

twenty-eight consecutive hours without unloading the same in a humane manner.

* * *

In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, *it being the intent of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated.* (Sec. 1.)

What is the "loading" time which the statute intended to exclude before beginning to count the 28 hours of permitted confinement?

It can not have been the loading time of each single animal because that takes no time worthy of legislative notice. Also the predecessor statute had been construed against this theory before the reenactment. (*U. S. v. Boston & Albany R. Co.*, 15 F. R., 209 *supra*.)

Nor for the same reasons can the loading time of the carload have been intended. That also would not practically have required the allowance; and the theory was likewise rejected before the reenactment. (*U. S. v. St. Louis & San Francisco R. Co.*, 107 F. R., 870, *supra*.)

Nor can it have been the loading time of the whole train, for trains are not loaded as trains. The cars are loaded and then *mobilized into a train*; and the statute does not except the time of confinement of the cattle during mobilization, but only the time of

the "loading." Nor if this had been the intended loading time of the exception, would Congress have included the times of confinement on lines of connecting carriers, which necessarily are *on other trains*, and which would naturally have been treated like any other part of the mobilizing of the ultimate train. Again, as trains are not practically loaded as units, no one can say when or where they are loaded. For instance, who can say when and where this train was loaded? When and where did the actual placing into confinement of these train cattle begin?

Consider, for example, the train here involved. An analysis illustrating this aspect of the question is attached as Schedule A. One of the shipments was loaded at Ridgway, Ill., one at Omaha, one at Iola, one at Noble, one at Clay City, one at Olney, two at Louisville, and three at Sumner. The time of the completion of the various loadings varied from 1.45 p. m. on the *Sam Chapman* lot, at Ridgway, to 11 p. m. on the *Van Gilder-McCane* lot, at Sumner. When was the train which was subsequently made up out of these loaded cars itself loaded?

The theory that the time of loading *and* mobilizing the train is what the statute means when it excepts the time of "loading" the cattle is out of accord also with the policy of the statute. The chief object of the act is "to prevent cruelty to animals;" and it is plain that Congress considered confinement in cars without food and drink for more than 28 hours (with a leeway up to 36) to be cruelty. It is

that cruel "*confinement in cars*" which it denounced and sought to suppress. The cruel confinement exists as well before a train is made up or after it is dispersed, as while it is proceeding. The statute therefore says "Confine in cars" and *not* "hold confined in a train of cars." So it expressly says:

It being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours, except upon the contingencies hereinbefore stated.

For 9 hours and 15 minutes *Sam Chapman's* cattle were physically "confined in cars" before the confinement of the *Van-Gilder-McCane* cattle began, and therefore they suffered at least that length of confinement before the train was mobilized, and possibly even before there was any train at all. Does not that 9 hours and 15 minutes go toward making up the 28 hours beyond which their confinement becomes cruel and illegal? Suppose no train cared to pick them up for a week, would they have to be confined for a week *and* 28 hours before any obligation to unload and feed arose?

On the other hand, exception of time for loading the shipment tallies with the general policy of the act and with its detailed provisions.

It satisfies the humane purpose of the act because the normal time practically covered by shipment loading is not so great as to create a dilemma.

It does not require any exception from the time counted other than the specified exception of the

time of loading; in other words, it does not require a further exception, by construction, of any such time as that of mobilizing the train.

It reconciles the inclusion of the time spent on prior connecting carriers, for if any of a shipment comes by a connecting carrier, all of it would.

It reconciles the special treatment of sheep shipments as differentiated from other shipments in the train.

It reconciles the provision for 36-hour requests *per shipment*.

It reconciles the provisions as to liability of the shipment owners to reimburse the railroad for its expense, and for a lien on behalf of the railroad as against the shipment.

It attacks the cruelty in case the cattle are held in confinement more than 28 hours before being taken into the train.

And it fixes a specific and definite time from which the 28 hours shall run.

B. If the beginning of the 28-hour period varies in time and place according to shipments, then of course the end of the period must vary in time and place according to shipments; and it is the end of the period which fixes the time and place of the statutory offense; for it is at the end of the period (and at no other time), and at whatever place the cattle then are (and at no other place) that the statutory duties arise and the punishable

failures of duty must occur—of which “every such failure” is separately made punishable by the statute.

In one clause the time (and therefore place) of the termination of the permitted period is *explicitly* made to vary *according to shipments*; that is, when (sec. 1) the owner of a “particular shipment” requests extension of the time as to his shipment to 36 hours. Even assuming that the 28-hour period should be construed not to begin with the mobilizing of the train, here Congress disclosed its intention that the duty still varied by shipments. If it had intended to make trainloads the units, it would have made the extension effective by trainloads—through requiring consent of all or some proportion of the owners concerned, and binding on all.

But even otherwise the incidence of the statute normally varies with the shipments, as is illustrated by Schedule A.

The *Sam Chapman* cattle (case 1867-1771) were the first to be loaded of the shipments subsequently collected into this train. Their confinement after loading began at Ridgway, Ill., at 1.45 p. m., on February 2. The permitted 28 hours expired on February 3, at 5.45 p. m., at whatever place they then were. Then and there the statute required that the confinement should be suspended, and it placed on the railroad a duty to unload them. The railroad admittedly did not unload them. Was there not *then and there* a “failure” of the statutory duty and a specific offense under the act?

The cattle of *A. Louis Oder* (case 1874) were those concerning which the duty to unload arose latest. Their confinement began at Olney, Ill., at 11 p. m., on February 2, 1907; and its lawful 28-hour extension ended on February 4 at 10 a. m., and at whatever place they then were. Did not the railroad, at that time and place fail of its duty in respect to them?

On February 3, then, at 5.45 p. m., wherever the *Chapman* cattle were (and whether in a train or not) they suffered the inhumanity denounced by the act.

On the following day, February 4, at 10 a. m., wherever the *Oder* cattle then were (and whether in a train or not) they in their turn suffered the inhumanity denounced by the act.

If the two failures are only one offense, when and where and in what district did it occur? Does the statute of limitations begin to run from February 3 or from February 4? Is "the district where the violation may have been committed" and in which the Government may, if it chooses, sue, the district in which the train was on February 3 or that in which it was on February 4?

And were there not two separate breaches of duty, distinct in time and place?

FOURTH.

In all of the 11 cases the failures to unload, etc., were separate offenses, because the statute intended that the mistreatment of cattle of different shipments should be separate offenses.

An incidental policy of the act is to protect the interests of the owners of the cattle.

U. S. v. Pere Marquette R. Co., 171 F. R., 586.

U. S. v. Oregon R. R. & N. Co., 163 F. R., 640.

U. S. v. Sioux City Stock Yards Co., 162 F. R., 556.

U. S. v. L. & N. R. Co., 18 F. R., 480.

In the committee report on the bill (59th Cong., 1st sess., No. 975, Schedule B, annexed) the committee said:

The bill seeks to provide:

1. A more humane way of handling all kinds of live stock during periods of transportation.

2. *Better control to the shipper, and, through more humane and orderly shipment, a decrease of loss or damage on the live stock in transit.*

3. Aid to the railroads, through greater elasticity (*based upon the wish of the owner*) in handling live stock more humanely and promptly, and to deliver it at its destination with less friction and delay.

The present act is substantially *verbatim* like its predecessor, the act of March 3, 1873, ch. 252, 17 Stat. L., 584, the provisions of which were incorporated into the Revised Statutes as sections 4386 to 4390, inclusive.

Under section 1 of that act (R. S., sec. 4388) it was provided that not only the carrier, but the owner or custodian of the animals, should be liable for the offense created by the act. The language was:

SEC. 4388. *Any company, owner, or custodian of such animals* who knowingly and willingly fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply.

It is evident from this that the offense created by that act must have been an offense which was a separate one as to each of the shipping owners, because the clause contemplates the offense to be the same with an alternative responsibility for that offense of the carrier and the owner.

The present act merely eliminated the owner and custodian of the cattle from the persons liable, but it did not undertake to change the nature of the offense, and it did nothing which indicated an in-

tention that such a change should be made. On the contrary, the evident purpose of the old statute to define the offenses according to shipping owners was emphasized by such changes as were made by the new clauses inserted by the new act, which were as follows:

The request clause, which specifically states its reference to particular shipments;

The clause which takes out the time consumed in loading and unloading from the 28 hours to be counted;

The clause concerning the exceptional treatment of shipments of sheep; and, finally,

The clause which permits the owner to do the feeding.

All of these clauses separate the train into shipments.

Not only this history and these provisions, but the following other provisions tend to show that the statute addressed itself to shipments and not trains of cattle:

* * * at the *reasonable expense of the owner* * * * and such railroad * * * shall have a *lien upon such animals* for food, care, and custody furnished, collectible *at their destination* in the same manner as the *transportation charges* are collected and shall not be liable [of course, to the owner] for any detention of *such animals* [i. e., the *owner's animals*] when such detention is of reasonable duration, to enable compliance with section 1 of this act.

The natural and normal unit in which railroads deal with freight is by shipments, and these provisions make it clear that that point of view is the one taken by this statute. There is no single place in which the trainload is referred to, whereas the relations between the owner and the railroad are constantly mentioned, the duties of the owner toward his cattle are referred to, and liabilities as between owners of particular shipments and the railroad are created. These points are all interwoven in the texture of the act, and there seems to be a certain arbitrariness in disentangling from this texture a single thread, and treating that on a totally different principle.

FIFTH.

The alleged mechanical inconveniences of operating a train under the shipment theory of this statute can be and in practice have been surmounted, and in any event they could not override the intention of Congress.

I.

Of course, any real practical difficulties tending to make the Government's construction of a statute actually difficult of operation would be a circumstance of weight in ascertaining the intention of Congress; but where, as in this case, the shipment theory is the only theory which will protect cattle from more than 28 (36) hours' confinement in cars, mere inconveniences (not amounting to impossibility) of the railroad are outweighed, for the intention to limit confinement to that time seems to be plain.

II.

However, the alleged difficulties are surmountable and have been surmounted where a railroad has acquiesced in the Government's construction and has made a genuine effort to conform operation to it.

The Chicago & Northwestern Railroad has dealt with the obligation imposed by the statute (as construed by the Government) in such a way as practically to eliminate the difficulties and avoid any offenses. This it has done by establishing a feeding and watering station at Clinton, Iowa—a point which is reached in less than 28 hours from the earliest among its various points of shipment, and from which, also, in less than 28 hours, its terminus at Chicago can be reached. Its schedules are arranged so as to marshal the various lots of cattle for feeding at this point and to carry them thence, five hours later on, to the terminal.

Also the officials of the Pennsylvania lines have announced to the Government the development of plans whereby the violations would cease. The method which they propose to use has not yet been disclosed to the Government, but it is not apparent why the method adopted by the Chicago & Northwestern Railroad is not open to practically all situations.

The Baltimore & Ohio Railroad Co. itself (which includes the plaintiff in error) has issued regulations of similar purport as follows:

Agents must carefully note current freight-train schedules and should it appear there-

from that the stock would not reach destination or the nearest regular unloading station within 28 hours, so inform the shipper and request his written authority to extend the time of confinement to 36 hours, provided the stock will reach destination or the nearest regular unloading station within that time. (I. C. C. B. & O. Circular No. 8945.)

Attached to this brief as Schedule B is the report in full of the Senate committee reporting the bill. (59th Cong. 1st sess., S. Rept. 975, Feb. 14, 1906, to accompany S. 3413.) This report also incorporates the letter and memorandum filed by Secretary Wilson with the committee.

It plainly appears from this report and from the memorandum of the Secretary that one of the objects of the new bill was to meet the operating difficulties inflicted upon the railroad by the old statute. The third general purpose of the bill, as stated in the enumeration of the purposes made by the statute, is—

(3) Aid to the railroads through greater elasticity (*based upon the wish of the owner*), when handling live stock more humanely and promptly and after delivery at its destination with less friction and delay [*italics ours*].

The 36-hour request provision affords the railroads a leeway which in practice would give them a method of equalizing the termination of the lawful periods of confinement of the various shipments, so that they can all occur at the same time without excessive and unlawful confinement of any of the cattle. In prac-

tice, also, it is found that the various shippers bring about a uniformity through concerted 36-hour requests.

The provision that—

When animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, provisions in regard to their being unloaded shall not apply

affords the railroad another method of avoiding the necessity of frequent interruptions of journeys; for if one of its points of shipment is in such a position that it does not conveniently tally with the feeding station (within 28–36 hours) all that it is required to do to meet the practical difficulties is to provide properly equipped cars.

Even without these provisions the railroads could conform their operation to the conditions in a very simple way merely by unloading all the cattle in the train as soon as the earliest load had finished its 28 hours of permitted confinement. Thereafter, any further periods of 28 hours would necessarily coincide.

Incidentally, it may be observed that owing to the situation of the shipping territory with reference to the markets there would occur only one necessity for feeding during the journey. The memorandum submitted to the committee by Secretary Wilson and incorporated into their report (Schedule B, annexed) states this as follows:

The great western markets are Chicago, East St. Louis, and the Missouri River towns.

The ranges and feed lots are so located that if the railroads give the shippers anything like reasonable service, with a 36-hour limit, by far the larger proportion of live stock can be transported to market within 36 hours, and this will obviate the necessity for unloading the greater part of the stock. With a 36-hour limit it will not be necessary to unload live stock from any locality more than twice.

SIXTH.

The trainload theory has no affirmative recognition in the statute, and not even practical railroad administration requires it. Furthermore, it would tend to make the statute ineffective because the penalty which it would provide is so small.

CONCLUSION.

The judgment should be affirmed.

WINFRED T. DENISON,

Assistant Attorney General.

JANUARY, 1911.

SCHEDULE A.

EXHIBITING (1) THE VARIATIONS IN THE TIME WHEN THE DUTY TO UNLOAD, FEED, ETC., AROSE AS TO EACH LOT OF CATTLE. (2) THE ACTUAL PERIODS OF CONFINEMENT.

(a)	(b)	(c)	(d)	(e)	(f)	(g)
Number of case.	Owner.	Place of beginning of confinement [all in Illinois].	Time of beginning of confinement ¹ [all on Feb. 2, 1907].	Time of <i>actual</i> termination of confinement [all on Feb. 4, 1907].	Length of <i>actual</i> confinement.	End of lawful length of confinement.
1867 (1771)....	Sam Chapman.....	Ridgway.....	1.45 p. m.....	11.10 a. m.....	45 hrs. 25 m....	Feb. 3: 5.45 p. m.
1870.....	Wm. F. Harrell.....	Omaha.....	2.15 p. m.....	11.35 a. m.....	45 hrs. 20 m....	Feb. 4: 2.15 a. m. ²
1868.....	Mason & Kemmer.....	Louisville.....	2.30 p. m.....	11.25 a. m.....	44 hrs. 55 m....	Feb. 4: 2.30 a. m. ²
1872.....	J. H. Brown.....	Iola.....	3 p. m.....	11 a. m.....	44 hrs. 15 m....	Feb. 4: 3 a. m. ²
1866 (1770)....	J. A. Brooke.....	Louisville.....	3.30 p. m.....	11.15 a. m.....	43 hrs. 45 m....	Feb. 4: 3.30 a. m. ²
1880.....	Shannon Bros. & Co....	Noble.....	7.15 p. m.....	11.10 a. m.....	39 hrs. 55 m....	Feb. 3: 11.15 p. m.
1884.....	Chaffin & Knowles.....	Clay City.....	8.30 p. m.....	11.10 a. m.....	38 hrs. 40 m....	Feb. 4: 12.30 a. m.
1869.....	Walter Van Gilder.....	Sumner.....	10 p. m.....	12.25 p. m.....	38 hrs. 25 m....	Feb. 4: 2 a. m.
1873.....	Brian, Shick & Co.....	Sumner.....	10 p. m.....	11.10 a. m.....	37 hrs. 10 m....	Feb. 4: 2 a. m.
1874.....	A. Louis Oder.....	Olney.....	10 p. m.....	11.10 a. m.....	37 hrs. 10 m....	Feb. 4: 10 a. m. ²
1871.....	Walter Van Gilder and Ber. McCane.	Sumner.....	11 p. m.....	12.30 p. m.....	37 hrs. 30 m....	Feb. 4: 3 a. m.

¹ End of loading as provided by sec. 1.

² Request: 36 hours.

SCHEDULE B.

[Senate Report No. 975, Fifty-ninth Congress, first session.]

PREVENTION OF CRUELTY TO ANIMALS WHILE IN TRANSIT.

FEBRUARY 14, 1906.—Ordered to be printed.

Mr. WARREN, from the Committee on Agriculture and Forestry, submitted the following report (to accompany S. 3413):

The Committee on Agriculture and Forestry, which has had under consideration the bill (S. 3413) to prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections 4386, 4387, 4388, 4389, and 4390 of the United States Revised Statutes, reports the same back to the Senate favorably and recommends that, with the following amendments, the bill do pass:

On page 2, in line 7, after the word "shipment," insert the words "which written request shall be separate and apart from any printed bill of lading or other railroad form."

On page 2, in line 11, after the word "accidental," insert the words "or unavoidable."

On page 5, in line 8, before the word "causes," insert the words "or unavoidable."

The bill seeks to provide:

1. A more humane way of handling all kinds of live stock during periods of transportation.

2. Better control to the shipper, and, through more humane and orderly shipment, a decrease of loss or damage on the live stock in transit.

3. Aid to the railroads, through greater elasticity (based upon the wish of the owner) in handling live stock more humanely and promptly, and to deliver it at its destination with less friction and delay.

A strict application of the present law (which was for many years almost a dead letter) inflicts great hardship upon the dumb brutes in transit, great inconvenience and loss upon the owners, and unnecessary delay and consequent loss upon the carrier.

The law is mandatory that twenty-eight hours shall be the limit of confinement in car, whereas in many cases twenty-nine or thirty hours would land the stock into market with no unloading and reloading from point of shipment to destination. To always break the trip at twenty-eight hours or any earlier time, and take the stock out of the cars and into yards and then put them back into the cars again causes very much greater hardship and punishment to the stock than if it were taken through directly to destination, provided the entire time does not exceed the thirty-six hours proposed as the maximum, under some circumstances, in this measure.

Again: The twenty-eight hours might expire in the early part of the night, while cars were distant from any proper chutes or yards for unloading; and to leave the stock standing in the cars on a sidetrack is as bad, and perhaps worse, than to move along until daylight to some place for unloading.

Chutes and yards for live stock are installed only at certain stations, and for obvious reasons can only be properly installed at certain stations, leaving long

distances between, where, if cars are delayed, stock must remain unloaded. If it is a large shipment of stock it is practically useless to unload it at some small yard where there is but one chute, intended for the loading and unloading of single or few animals, or, at the most, a car at a time. A large shipment of several cars of stock should be unloaded at yards where there are from two to a dozen chutes, and sufficient yards to permit the unloading and reloading of a whole train without long delay, and without exciting, bruising, and therefore greatly injuring the stock.

In the case of shipments of sheep, it is practically impossible to unload them in the night, and the consequence is, if no place can be reached in daylight the shipment must proceed either until daylight or far enough to reach some proper unloading place, and there wait for daylight, before they can be unloaded.

To those who know the habits of sheep it is unnecessary to more than state this fact: To unload them in the night is to drag them out one at a time and tie each one or confine it to prevent its returning to its fellows in the car. On the other hand, sheep drink but little and can go longer without food and water than can cattle.

It is an extreme hardship to apply the twenty-eight-hour law to all cases and under all circumstances.

If the shipment of live stock is judged from the standpoint of a city or village man who sees only the domesticated, well-broken animals in the habit of being handled as individuals or in small numbers, the hardship of the law as at present would not seem severe. But the great proportion of live stock shipped by railroad is from the plains and pastures where the

animals have not been handled and domesticated, but are wild and nervous, and in loading for shipment, even if they are quietly handled, considerable suffering and loss must occur. And after the stock has covered a part of its journey, it becomes more nervous and excited, and the unloading and reloading brings about still greater suffering and loss. Unloading them into muddy yards—and the yards are often in bad condition—gives them little rest and less food, and oftentimes they refuse to drink the impure water afforded in the unclean yards.

A strict compliance with the present law has developed some legal technicalities and shortcomings, which are referred to in the memorandum prepared by the Department of Agriculture, which follows:

The bill provides that where live stock is being shipped in trains of ten cars or more, an average rate of speed of not less than 16 miles an hour shall be maintained, unless prevented by "accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight." This can work no hardship to the railroads in the proper conduct of their business.

The following is a letter from the Secretary of Agriculture transmitting a memorandum prepared jointly by the legal adviser of his department and the Chief of the Bureau of Animal Industry; and the views expressed therein have the indorsement of your committee:

DEPARTMENT OF AGRICULTURE,
OFFICE OF THE SECRETARY,
Washington, D. C., February 12, 1906.

DEAR SENATOR HANSBROUGH: I transmit herewith a memorandum on the subject of Senate bill No. 3413, relative to the confinement of live stock while in transit by railroad

or other means of transportation, which has been prepared at your request by Doctor Melvin and Mr. McCabe.

Very truly, yours,

JAMES WILSON,
Secretary.

Hon. H. C. HANSBROUGH.
*Acting Chairman Senate Committee on
Agriculture and Forestry.*

[Memorandum.]

It is suggested that the bill be amended by inserting in line 7 of section 1, after the word "shipment," the words "which written request shall be separate and apart from any printed bill of lading or other railroad form." It is thought that this amendment is necessary from the fact that without it it will be possible for the request to be incorporated in the printed form and signed by the shipper pro forma.

The statute commonly referred to as the twenty-eight-hour law was enacted by the Forty-third Congress and became a law by the approval of President Grant on March 3, 1873. It now forms sections 4386-4390 of the United States Revised Statutes. It prohibits the confinement in cars, boats, or other vessels for a longer period than twenty-eight consecutive hours of cattle, sheep, swine, or other animals which are being conveyed from one State to another without unloading the same for rest, water, and feeding for a period of at least five consecutive hours, unless prevented by storm or other accidental cause. The penalty for violation of the statute is from \$100 to \$500. The provision for unloading does not apply when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to

rest. The present bill proposes to repeal sections 4386-4390 of the United States Revised Statutes and to enact similar legislation, with some few amendments and changes, as follows:

1. The statute is broadened to cover practically every common carrier of live stock, including receivers of any such carriers. The Supreme Court has held in the case of *United States v. Harris* (177 U. S., 305) that the present law does not include the receiver of a railroad company. A short time ago a certain railroad in the hands of a Federal receiver was confining animals 50 and even 60 hours without rest, food, or water, and the receiver could not be reached under the present law.

2. The transportation of live stock from a State to a Territory, from a Territory to a State, or from or into the District of Columbia, is covered by this bill. The United States court of the district of Kansas has held recently in the case of the *United States v. The St. Louis and San Francisco Railroad Company* (an unreported case) that the present law does not cover a shipment from a Territory to a State, the wording of the statute being "* * *" which transports live stock from one State to another."

3. In the present bill it is proposed that the time during which animals may be confined by the carrier without food, rest, or water, shall remain at twenty-eight hours, the time provided in the present law, with the exception that upon the written request of the owner or person in custody of the shipment, the time may be extended to thirty-six hours. It frequently happens that the twenty-eight-hour limit has expired when the shipment was within a few hours of the destination, and if the law is made sufficiently elastic to enable the shipper to control this matter it is thought that less suffering will result to live stock in transit.

It is the opinion of the best informed owners and shippers of live stock that when live stock can be carried to market within thirty-six hours it is better and more humane to allow them to go through without unloading than to unload at the end of twenty-eight hours.

Based upon careful observation of the workings of the law, the treatment of the live stock to the advantage of the shippers and owners thereof, it is the opinion of the Department of Agriculture that if certain other amendments to the present law, which are incorporated in the bill now in discussion, shall be adopted, the time during which live stock may be confined in cars without food, rest, or water may be extended from twenty-eight hours to thirty-six hours without disadvantage to the live stock. The great western markets are Chicago, East St. Louis, and the Missouri River towns. The ranges and feed lots are so located that if the railroads give the shippers anything like reasonable service, with a thirty-six hour limit by far the larger proportion of live stock can be transported to market within thirty-six hours, and this will obviate the necessity for unloading the greater part of the stock. With a thirty-six hour limit it will not be necessary to unload live stock from any locality more than twice.

4. This bill provides that live stock must be loaded and unloaded in a humane manner and into properly equipped pens. This is a serious omission in the present law. Cases have been reported to the Department of Agriculture, and confirmed by that department, where live stock has been unloaded in a brutal manner and into pens in which the mud was 2 feet deep and the facilities for feeding and watering, to say nothing of resting, were entirely inadequate. Under the present law the Department of Agriculture could not correct these conditions.

5. This bill provides that the time consumed in loading and unloading shall not be counted in computing the time during which live stock may be confined in transit. This simply amounts to incorporating into the law the practice which has prevailed in the enforcement of the present law.

6. It is provided in this bill that in the case of sheep, when the expiration of the time limit occurs at night, they may be allowed to continue in transit until daylight, if by so doing they will reach a place where they can be properly fed, watered, and cared for. The unloading of sheep at night, even under the most favorable conditions with electric-lighted yards and trained goats, is a difficult process. It frequently happens that the time limit expires during the night at a point where these facilities are not available, and it is then utterly impracticable to unload sheep.

7. In section 2 of the bill there is an immaterial change from the wording of the present law regarding the collection of the feeding charges.

8. It is also provided in section 2 of this bill that the shipper shall have the right to furnish the necessary food for his stock in transit if he so desires. The present law gives a lien on the stock for food furnished by the carrier, and it has happened that many companies have charged exorbitant fees for supplying food, and the owners and shippers of stock in many cases have been outrageously overcharged.

9. In section 3—a penalty section—in this bill the word “willfully” is used where the word “willingly” occurs in the corresponding section of the present law. It should be stated in this connection that the original act, as it passed Congress and was approved by the President, contained the word “willfully,” but through an error while incorporating into the

Revised Statutes it became changed to "willingly."

10. Section 3 of the present bill—a penalty section—is changed by exempting the owner or shipper of the live stock from the penalty for failure to unload for food, rest, and water. The present law, as construed by the Federal courts, imposes liability for this failure equally upon the shipper and the carrier. The shipper surrenders control of the live stock in a large measure to the carrier, and he is unable to unload the stock without the active cooperation of the carrier. Inasmuch as the carrier is assured payment for food furnished, it is thought the primary liability for failure to unload should be laid upon the carrier.

11. In section 4 of the present bill it is provided that United States attorneys shall prosecute all violations of the act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means. The measure relates entirely to animal industry which, in all other respects, is under the control of the Department of Agriculture, and the inspectors of the Bureau of Animal Industry, from their location and the character of their work, are well situated to secure the enforcement of the law.

12. Section 5 of the present bill provides that it shall be the duty of every common carrier of live stock, other than a carrier by water, wholly or in part engaged in the interstate transportation of live stock by railroad, to transport said live stock with due diligence and to maintain in all trains containing 10 or more cars of live stock in interstate traffic an average minimum rate of speed of not less than 16 miles per hour from the time any such live stock is loaded upon or into the cars and made part of the train until the train reaches its destination or junction point for delivery

to another carrier, deducting only in the computation of such average minimum speed such reasonable time as the live stock may be delayed necessarily in unloading to feed, water, and rest, and in feeding, watering, and resting, and in reloading, and such time as the live stock may be delayed by storm or by other accidental causes which can not be anticipated or avoided by the exercise of due diligence and foresight.

It is thought that the requirement of a minimum speed of 16 miles per hour on live-stock trains is reasonable and will not be unduly burdensome upon any railroad. The railroad is protected from violations on account of storms or unavoidable accidents to track or equipment, and the section does not apply to mixed trains which contain less than 10 cars of live stock. It is the opinion of the officers of the Department of Agriculture that a reasonable speed minimum should be adopted in order to protect the shippers and owners of live stock and the live stock itself.

13. In section 6 of the bill it is provided that any common carrier of live stock, other than a carrier by water, who knowingly and willfully fails to maintain a minimum speed of 16 miles per hour, as required by section 5, shall, for every such violation, be liable for and pay a penalty of not less than \$100 nor more than \$500.

SCHEDULE C.

TEXT OF TWENTY-EGHT-HOUR LAW.

(Act of June 29, 1906, c. 3594, 34 Stat. L., 607.)

AN ACT To prevent cruelty to animals while in transit by railroad or other means of transportation from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, and repealing sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the United States Revised Statutes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no railroad, express company, car company, common carrier^{1 a} other than by water, or the receiver, trustee, or lessee² of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals³ shall be conveyed from one State or Territory or the District of Columbia into or through another State⁴ or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessels carrying or transporting cattle, sheep, swine, or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine⁵ the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours⁶ without unloading the same in a humane manner, into properly equipped pens⁷ for rest, water, and feeding,⁸ for a period of at least five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes⁹

^a Figures refer to annotations in the edition published by the Department of Agriculture.

which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to thirty-six hours.¹⁰ In estimating¹¹ such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent¹² of this act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated:¹³ *Provided*, That it shall not be required that sheep¹⁴ be unloaded in the nighttime, but where the time expires in the nighttime¹⁵ in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

SEC. 2. That animals so unloaded shall be properly fed and watered during such rest either¹⁶ by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such railroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected,

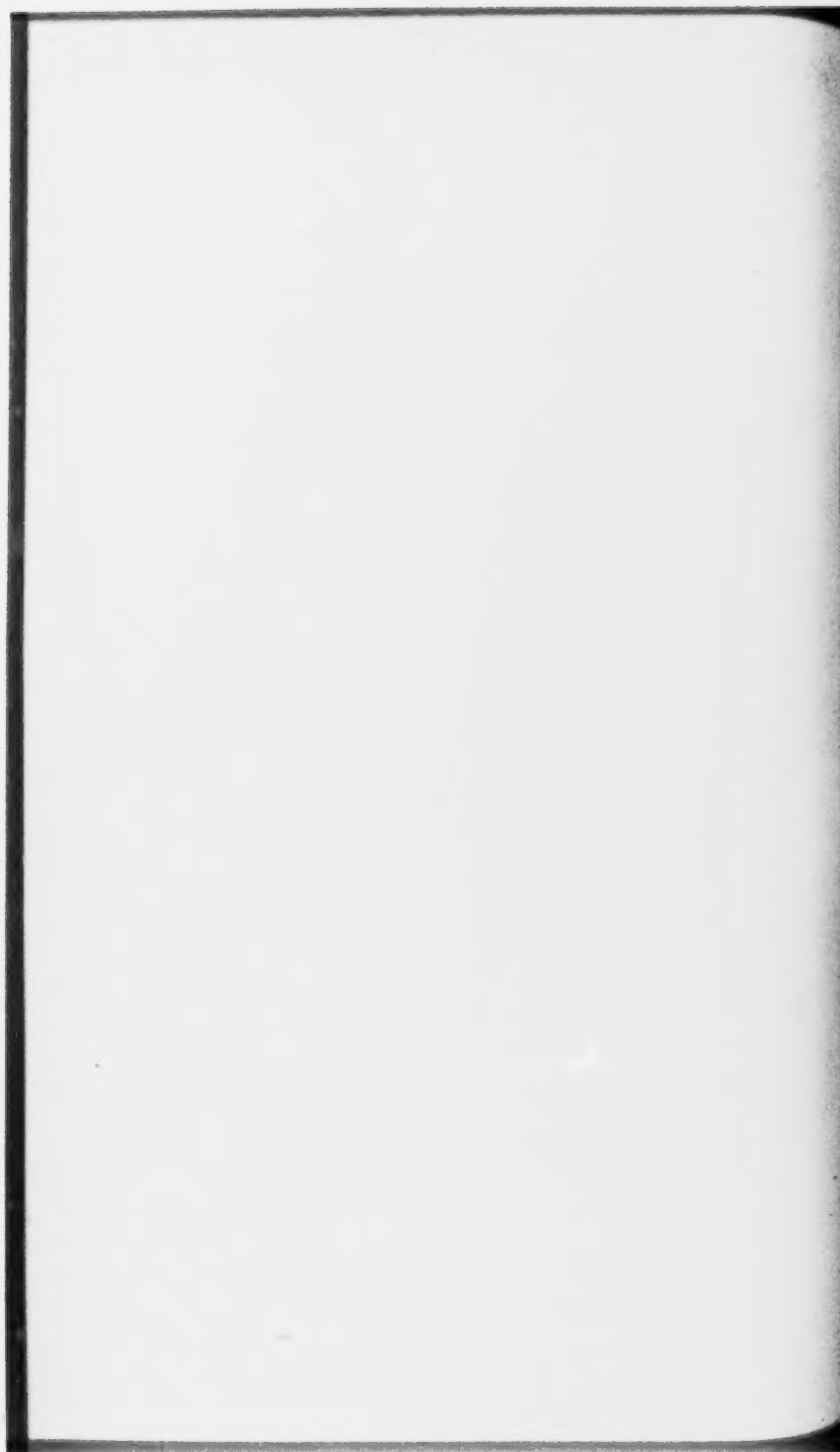
and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor if he so desires.

SEC. 3. That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly¹⁷ and willfully¹⁸ fails to comply with the provisions of the two preceding sections shall for every¹⁹ such failure be liable for and forfeit and pay a penalty²⁰ of not less than one hundred nor more than five hundred dollars: *Provided*, That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply.

SEC. 4. That the penalty created by the preceding section shall be recovered by civil²¹ action in the name of the United States in the circuit or district court holden within the district²² where the violation may have been committed or the person or corporation resides or carries on business; and it shall be the duty of United States attorneys to prosecute all violations of this act reported by the Secretary of Agriculture, or which come to their notice or knowledge by other means.

SEC. 5. That sections forty-three hundred and eighty-six, forty-three hundred and eighty-seven, forty-three hundred and eighty-eight, forty-three hundred and eighty-nine, and forty-three hundred and ninety of the Revised Statutes of the United States be, and the same are hereby, repealed.

Approved, June 29, 1906.



In the Supreme Court of the United States.

OCTOBER TERM, 1910.

THE BALTIMORE AND OHIO SOUTHWESTERN Railroad Company, plaintiff in error, <i>v.</i> THE UNITED STATES.	}	No. 7.
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THE BALTIMORE AND OHIO SOUTHWESTERN Railroad Company, plaintiff in error, <i>v.</i> THE UNITED STATES.	}	No. 8.
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ADDITIONAL MEMORANDUM FOR THE UNITED STATES.

(Filed pursuant to leave granted on the argument.)

I.

As to the nine shipments on which the duties arose
at different times and places.

In *O'Neill v. Vermont* (144 U. S., 323, p. 331) this court held that a Vermont statute against "selling intoxicating liquor without authority" authorized the imposition of 307 fines at \$20 each, making \$6,140, besides costs, with a provision attached to the sentence that if this amount was not paid by a day

named, then the defendant should serve in prison three days for each dollar, making 19,914 days. The court quoted, at page 331, the language of the Vermont court, in which it said that if the man chose to violate the statute 307 times by 307 sales of liquor he must meet the penalty provided.

In *Suydam v. State* (52 N. Y., 383) the defendant was held liable for 14 refusals to open his tollgate, as the statute provided a penalty "for each such offense." *Fisher v. N. Y. Central* (46 N. Y., 644) and *Sturgis v. Spofford* (45 N. Y., 453) were distinguished on the ground that the statutes which they involved did not say that the penalty should be imposed "for each such offense."

Pittsburg, etc. R. Co. v. Moore (33 Ohio State, 384) involved a statute which prohibited a railroad from demanding more than 3 cents per mile for a distance of more than 8 miles. The court refused to follow the *Fisher* case, and held that a penalty was due for every demand and receipt of excessive fare.

Parks v. Railroad Co. (13 Lea 1, Tenn.), which is referred to in the supplemental memorandum proposed to be filed by the plaintiff in error was a *qui tam* action on a statute which provided a penalty for failure during any trip to announce the stations. It was held that the plaintiff could collect only one penalty because (a) the act did not specify a penalty "for every offense;" (b) the act said "during any trip;" and (c) because the plaintiff was not a *bona fide* passenger, but was traveling just to get the penalties. It is true that one of the judges stated

(p. 5) that the law can not collect more than one penalty even if there are separate distinct offenses, but that was not the decision of the court, and if it had been it does not accord with the great weight of authority. In fact, it is the only expression of the sort that I have seen.

II.

On the point that all eleven of the cases are separate offenses because the statute intended that the mistreatment of cattle of different shipments should be separate offenses:

In addition to the considerations advanced on the argument, and at page 21 of the supplemental brief, the following are submitted:

The obligation of the statute is not limited to unloading.

There is in addition to the unloading, for instance, the obligation to feed and water, but as to this obligation the carrier is only a surety, so to speak. Its provision is as follows:

SECTION 2. That animals so unloaded shall be properly fed and watered during such rest *either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad* * * * at the reasonable expense of the owner or the person in custody thereof.

Here the primary duty is on the owner, and therefore must be per shipment, and it would seem that the surety's duty being merely alternative must also be with reference to the shipment. Suppose a surety

company by a single instrument guaranteed two different fiduciary officers; and suppose the statute provided that any defaulter or any surety for such defaulter who failed to make good the default should be liable to a penalty, would not the surety be liable to two penalties if both officers defaulted?

Considering the fact that in so many ways the statute varies the duties according to conditions of the shipments, and can not be operated except by recognition of shipments, and considering that such division by shipments accords with one of the purposes of the statute, as stated in the report of the committee, ("to protect the interests of the owner"), it is submitted that when the statute says "every such failure" it means every failure as to a shipment.

It is like the case of *Chicago, etc., R. Co. v. People*, 82 Ill. App., 679, where the statute prescribed a penalty "for each offense" of obstructing the highway, and by a single train the railroad obstructed several highways. It was held to provide a separate offense for each highway because the statute contemplated the protection of each highway.

In *Southern Railroad Co. v. State* (165 Ind., 613) the statute required that the railroad company should register on a blackboard at its stations the time of expected arrival of trains, and a penalty was provided "for each violation." It was held that there was a separate offense with reference to every ^{train} ~~item~~ as to the arrival of which item was not made.

In *Commonwealth v. Jay Cooke* (50 Pa. State, 201) the statute said, "Every banker or broker who shall neglect or refuse to make the return and report required by the first and second sections of this act shall for every such neglect be subject" to the penalty. Cooke was held liable as for two distinct offenses (1) the failure to make the return which was required by the first section and (2) the failure to make the report which was required by the second section.

Respectfully submitted.

^{Winfred}
~~WINFORD~~ T. DENISON,
Assistant Attorney General.

BALTIMORE AND OHIO SOUTHWESTERN RAIL-
ROAD COMPANY *v.* UNITED STATES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH
CIRCUIT.

Nos. 7, 8. Argued March 4, 1910; restored to docket for reargument April 4, 1910; reargued January 5, 6, 1911.—Decided March 20, 1911.

Every penal statute has relation to time and place; and corporations, whose operations are conducted over a large territory by many agents, may commit offenses at the same time in different places, or at the same place at different times.

The construction given to an identical former act prior to its reenactment by Congress, that penalties thereunder were not measured by number of cattle or number of cars, followed. *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States v. St. Louis R. R. Co.*, 107 Fed. Rep. 807.

The act of June 29, 1906, c. 3594, 34 Stat. 607, to prevent cruelty to animals in transit, is general and applies to all shipments of cattle as made. The statute is not for the benefit of shippers but is restrictive of their rights, and violations are not to be measured by the number of shippers, but as to the time when the duty is to be performed.

Under the act of June 29, 1906, to prevent cruelty to animals in transit, offenses are separately punishable for every failure to comply with its provisions by confining animals longer than the prescribed time; and there is a separate offense as to each lot of cattle shipped simultaneously as the period expires as to each lot, regardless of the number of shippers or of trains or cars.

Where cases are properly consolidated below, as these and others were, the aggregate amount of possible penalties in all the actions consolidated is the measure of the amount in controversy to give jurisdiction to this court.

159 Fed. Rep. 33, modified and affirmed.

"THE act to prevent cruelty to animals while in transit," approved June 29, 1906 (c. 3594, 34 Stat. 607), provides:

"SEC. 1. That no railroad . . . whose road forms

any part of a line of road over which cattle . . . or other animals shall be conveyed . . . [in interstate commerce] . . . shall confine the same in cars, boats or vessels of any description for a period longer than 28 consecutive hours without unloading the same in a humane manner, into properly equipped pens, for rest, water and feeding, for a period of at least five consecutive hours, unless prevented by . . . unavoidable causes. . . . *Provided*, That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinement may be extended to 36 hours. In estimating such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this act to prohibit their continuous confinement beyond the period of 28 hours, except upon the contingencies hereinbefore stated. . . .

"SEC. 2. That animals so unloaded shall be properly fed and watered during such rest. . . .

"SEC. 3. That any railroad . . . who knowingly and willfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. . . .

"SEC. 4. That the penalty created by the preceding section shall be recovered by civil action in the name of the United States. . . ."

Under this act eleven actions were instituted in the Southern District of Ohio against the Baltimore and Ohio Southwestern Railway Company.

The complaint in each case gave the name of the station in Illinois from which the animals were shipped to

Cincinnati, the marks of the cars in which they were shipped, the hour on February 2, 1907, when they were loaded, and the various periods of confinement, which varied from 37 to 45 hours. The separate shipments consisted of one, two, three, and four carload lots, aggregating twenty-one cars, containing several hundred cattle and hogs. Most of the shipments were loaded at different times; but because one (1872) was forwarded under the 36-hour rule, the time for its unloading was the same as that of another shipment (1871), made eight hours later under the 28-hour rule, from a different station. At another station there were three shipments of one carload each of cattle, belonging to different owners loaded at the same time, but two (1869, 1873) of the cars were forwarded under the 28-hour rule and the other (1874) under the 36-hour rule.

The railroad company filed a separate plea in each case, admitting the allegations of the complaint, but setting up that "the shipment therein was forwarded to Cincinnati on its train No. 98, on which there were also loaded and forwarded other cattle, referred to in each of the other suits, and in the said several causes the said plaintiff is entitled to recover but one penalty, not to exceed five hundred dollars, which it is ready and willing to pay, and it pleads the said separate suits in bar to the recovery of more than five hundred dollars for all of the same."

The district attorney's motions for separate judgments on the admission in the several pleas were overruled. The court sustained the company's motion to consolidate the causes, entered judgment for a single penalty, and ordered "that the within order in case 1866 shall apply to, operate upon and be conclusive of all the rights of the plaintiff in each of the several causes, to wit, 1867-1874, 1880 and 1884." The Government sued out a writ of error in case 1866 and, apparently out of abundant cau-

tion, another in 1867, later entering into a stipulation in the Circuit Court of Appeals that the result in these two cases should control all the others.

The Circuit Court of Appeals for the Sixth Circuit (159 Fed. Rep. 33), held that the order of consolidation was proper, but reversed the judgment on the ground that the United States were entitled to recover eleven penalties or one for each of the eleven shipments.

Mr. Edward Colston, with whom *Mr. Judson Harmon*, *Mr. A. W. Goldsmith* and *Mr. George Hoadly* were on the brief, for plaintiff in error:

At the expiration of the 28-hour and also of the 36-hour period, all the cars constituted but a single train. Under § 3, the penalty is for failure to comply with the requirement that no live stock be confined in cars for a longer period than 28 hours without unloading. The number confined, whether estimated by the head, by the number of shipments, or by the carloads, is unimportant.

Under the Government's claim, if fifty horses, each belonging to a different shipper but shipped on the same train, were detained beyond the statutory time, there should be fifty penalties, but if all the horses belonged to the same person and were shipped to the same consignee by the same train, there would be but one penalty. As to construction of the old statute, §§ 4386, 4388, Rev. Stat., see *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States v. St. Louis & S. F. R. R. Co.*, 107 Fed. Rep. 870. As Congress knew how the law had been interpreted in these two decisions and that the penalty did not multiply by either the number of cattle or by the number of cars, or by the number of shipments, it may be considered that a like construction was intended, and was expected to be given to those words. *Mason v. Fearson*, 9 How. 258; *United States v. G. Falk & Bro.*, 204 U. S. 143; *United States v. Hermanos*, 209

U. S. 339; *New Haven R. R. Co. v. Int. Comm. Comm.*, 200 U. S. 401; *White-Smith Music Co. v. Apollo Co.*, 209 U. S. 14; and see communication from Secretary of Agriculture, p. 3774, Cong. Rec., 59th Cong., 1st Sess.

The practice of the railroads in running solid stock trains was well known to Congress, and if the Congress had intended this law should carry the multiple penalties it would have said so. Whether \$500 is not punishment enough to deter the railroads from violating the statute is a consideration of the sort that addressed itself to the legislature and not to the judiciary. *N. Y. C. & H. R. R. R. Co. v. United States*, 165 Fed. Rep. 833.

Being penal, this statute should be favorably construed for the carrier. For cases below on this point, see *United States v. N. Y. C. & St. L. R. Co.*, 168 Fed. Rep. 699; *Southern Pacific Ry. Co. v. United States*, 171 Fed. Rep. 363; *United States v. Oregon R. & N. Co.*, 163 Fed. Rep. 640; *United States v. A., T. & S. F. Ry. Co.*, 166 Fed. Rep. 160.

The rule for the interpretation of penal statutes is against the conclusion reached by the Court of Appeals. *United States v. Corbett*, 215 U. S. 233; *United States v. Sheldon*, 2 Wheat. 119; *United States v. Wiltberger*, 5 Wheat. 95. It is the legislature, not the court, which is to define a crime and ordain its punishment. But courts do ordain punishment when they undertake, as was done here, to multiply the penalty that the legislature has prescribed. *Elliott v. Railroad Co.*, 99 U. S. 576; *France v. United States*, 164 U. S. 682; *Bolles v. Outing Co.*, 175 U. S. 262; *United States v. Harris*, 177 U. S. 305.

It cannot be said it was an oversight or inadvertence, that Congress did not attach a penalty to each shipment, or carload or head of stock. If Congress had intended that the penalty clause should receive a different construction from that put on it by the prior decisions it would have made provision to that effect at the time of

this reenactment. *Werckmeister v. American Tobacco Co.*, 207 U. S. 381.

One offense cannot be split into many, and penalties thereby multiplied. 1 Bishop's New Crim. Law, §§ 793, 1061. In a criminal case no significance attaches to ownership except as it is a matter of identification of the property. *Nichols v. Commonwealth*, 78 Kentucky, 180; *State v. Fayetteville*, 2 Murphey (N. C.), 371; *Crepps v. Durden*, 2 Cowper, 640.

Congress did not esteem it necessary to inflict a fine of five hundred dollars for each shipment in a trainload containing possibly fifty shipments. See *State v. Stevens*, 81 Vermont, 445; Bishop on Statutory Crimes (2d ed.), ch. LXI (bot. p. 627), § 1121; *Fontaine v. State*, 6 Baxter, 514; *Woodford v. People*, 62 N. Y. 117; *United States v. Patty*, 2 Fed. Rep. 664; *Commonwealth v. O'Brien*, 107 Massachusetts, 208; *Louisiana v. Batson*, 108 Louisiana, 479; *Ward v. State*, 90 Mississippi, 249.

As to whether offenses committed against different persons are multiple or constitute but a single offense, see 12 Cyc. 289; 22 Cyc. 383; 25 Cyc. 61; and see also as to what constitutes a single offense: *Friedborn v. Commonwealth*, 113 Pa. St. 244; *Commonwealth v. Robinson*, 126 Massachusetts, 260; *Hurst v. State*, 86 Alabama, 604; *Hoiles v. United States*, 3 MacArthur, 371; *State v. Hennessy*, 23 Ohio St. 339, 347; *Smith v. State*, 59 Ohio St. 357, 358.

The amount in controversy is \$5,500, the maximum fine that could be assessed if the claim of the United States prevails. The effect of the consolidation of all the eleven cases into one case makes the amount in controversy \$5,500. *Beadles v. Smyser*, 209 U. S. 393.

All the cases representing, as they do, but a single controversy, and all having in fact been taken to the Court of Appeals and to this court as one case, it matters not, even if it be conceded, that the stipulation was that

no writ of error should be taken except in two of the cases. Such agreement would be invalid for want of consideration. *Ogdensburg &c. Ry. Co. v. Vermont &c. R. R. Co.*, 63 N. Y. 176; *Southern Railway Co. v. Glenn*, 98 Virginia, 309, 318; *Jones v. Spokane Valley Co.*, 87 Pac. Rep. 65; *Ward v. Hollins*, 14 Maryland, 158; *Mackey v. Daniel*, 59 Maryland, 484.

Mr. Solicitor General Bowers for the United States on the original argument; *Mr. Assistant Attorney General Denison* for the United States on the reargument:

Four theories as to the unit of offense have been suggested from time to time. They are: The individual animal, the carload, the trainload, and the shipment. The individual-animal theory was rejected in *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 209, as was the carload theory in *United States v. St. Louis & San Francisco R. Co.*, 107 Fed. Rep. 870. The trainload theory has had no substantial support in the lower courts. The shipment theory has been upheld by all the courts in which it has been involved excepting the District Court below. *United States v. Balt. & Ohio S. W. R. R. Co.*, 159 Fed. Rep. 33; *United States v. N. Y., C. & St. L. R. R. Co.*, 168 Fed. Rep. 699; *Southern Pacific Co. v. United States*, 171 Fed. Rep. 360, 363, aff'g 162 Fed. Rep. 412, and also in effect 157 Fed. Rep. 459; *N. Y. Central & H. R. R. Co. v. United States*, 165 Fed. Rep. 833, 843; *United States v. Oregon R. R. & Nav. Co.*, 163 Fed. Rep. 642; *United States v. Atchison, T. & S. F. R. R. Co.*, 166 Fed. Rep. 160.

The unit of offense under the act is not a continuing "confining cattle" in general, but it is the distinct "failure" to unload, feed, water, and rest whatever cattle shall then and there have completed 28 hours of confinement. It is for "every such failure" that the statute provides a penalty.

Where each item of an illegal doing of business is made a separate offense, penalties may be recovered for each. *State v. Broeder*, 90 Mo. App. 169; *State v. Heard*, 107 Louisiana, 60; *State v. Shafer*, 20 Kansas, 226; *Benson v. State*, 44 S. W. Rep. 168. Such items of action, even though coincident or concurrent or similar, are, nevertheless, separate offenses. *United States v. St. Louis Southwestern R. Co.*, decided December 13, 1910; *People v. N. Y. Central R. R. Co.*, 13 N. Y. 78; *Chic. &c. R. R. Co. v. People*, 82 Ill. App. 679; *Indiana So. R. Co. v. State*, 165 Indiana, 613.

In this case, the statute makes each failure a separate offense, and not the whole series.

Failures to perform statutory obligations are separate offenses if they occur at different times or different places.

If, one by two strokes or shots injures two persons, there are two offenses, even though there was only one brawl; *Flemister v. United States*, 207 U. S. 373; *State v. Temple*, 194 Missouri, 228; *Augustine v. State*, 41 Tex. Cr. R. 59; *Kelly v. State*, 43 Tex. Cr. R. 40; *People v. Ocholski*, 115 Michigan, 601; *Baker v. Commonwealth*, 20 Ky. Law R. 879; 12 Cyc. 289; although where defendant by the same shot wounded four fishermen seated around a camp fire, it was held to be only one crime. *Sadberry v. State*, 39 Tex. Cr. R. 466; 12 Cyc. 289.

So as to counterfeits at different times; *Bliss v. United States*, 105 Fed. Rep. 508; *United States v. Radenbush*, 8 Pet. 288; although it may be only a single offense to possess two counterfeiting plates. *United States v. Miner*, 11 Blatch. 511; S. C., 26 Fed. Cas., No. 15,780; *Miller v. State*, 72 S. W. Rep. 856; *Collins v. State*, 39 Tex. Cr. R. 30. See also *Stevens v. State*, 58 S. W. Rep. 96; *State v. Burlingham*, 146 Missouri, 207; *O'Neill v. Vermont*, 144 U. S. 323, 331; *Suydam v. State*, 52 N. Y. 383; *Pittsburg &c. R. Co. v. Moore*, 33 Ohio St. 384; *Parks v. Railroad Co.*, 13 Lea (Tenn.), 1; *Commonwealth v. Hazlett*, 16 Pa. Super.

Ct. 534; *Commonwealth v. Rockafellow*, 3 Pa. Super. Ct. 588.

The failures to unload charged in nine of the eleven cases all occurred at separate times and places.

In all of the eleven cases the failures to unload, etc., were separate offenses, because the statute intended that the mistreatment of cattle of different shipments should be separate offenses.

An incidental policy of the act is to protect the interests of the owners of the cattle. *United States v. Pere Marquette R. R. Co.*, 171 Fed. Rep. 586; *United States v. Oregon R. R. & N. Co.*, 163 Fed. Rep. 640; *United States v. Sioux City Stockyards Co.*, 162 Fed. Rep. 556; *United States v. L. & N. R. R. Co.*, 18 Fed. Rep. 480; *Chicago &c. R. R. Co. v. People*, 82 Ill. App. 679; *Southern Railroad Co. v. State*, 165 Indiana, 613; *Commonwealth v. Jay Cooke*, 50 Pa. St. 201; and see Sen. Rep. No. 975, 59th Cong., 1st Sess.

The alleged mechanical inconveniences of operating a train under the shipment theory of this statute can be and in practice have been surmounted, and in any event they could not override the intention of Congress.

The natural and normal unit in which railroads deal with freight is by shipments, and those provisions make it clear that that point of view is the one taken by this statute.

The trainload theory has no affirmative recognition in the statute, and not even practical railroad administration requires it. Furthermore, it would tend to make the statute ineffective because the penalty which it would provide is so small.

Under the stipulation in this case this court has not jurisdiction; only two cases, each involving \$500, are appealed, and the total amount in controversy is only \$1,000. The amount in controversy in a case is not measured by the full amount of plaintiff's claim when defendant ad-

mits or agrees to a part of it, but is measured by the excess of plaintiff's claim above what defendant admits or acquiesces in. *Jenness v. Citizens' Nat. Bank*, 110 U. S. 52; *Hilton v. Dickinson*, 108 U. S. 165; *Gorman v. Havird*, 141 U. S. 206.

And the matter in dispute is the amount involved on the writ of error—not necessarily the same as was involved below. *Gordon v. Ogden*, 3 Pet. 33. The amount in dispute may, and must, be determined from the whole record. *Bowman v. C. & N. W. Ry. Co.*, 115 U. S. 611, 613.

MR. JUSTICE LAMAR, after making the foregoing statement, delivered the opinion of the court.

The consolidated record of the eleven cases shows that several hundred cattle and hogs of eleven different owners, shipped in 21 cars, loaded at different stations at various hours on February 2, 1907, were in one train at the time of the expiration of the successive periods for the unloading required by the act of 1906, "to prevent cruelty to animals in transit." The question is as to the number of penalties for which, in such a case, the carrier is liable.

Under the nearly identical act of 1873, Rev. Stat. § 4386, it was held that the penalties were not to be measured by the number of cattle in the shipment, nor the number of cars in which they were transported. *United States v. Boston & Albany R. R. Co.*, 15 Fed. Rep. 209; *United States v. St. Louis R. R. Co.*, 107 Fed. Rep. 807. And the company contends that as the cattle here were in one train the failure to unload was one offense, punishable by one penalty. In support of its position it relies, among others, on authorities which hold that in larceny, if the goods stolen at one time belong to several persons the offense is single; and that, on conviction for working on Sunday, there is only one breach of the statute, the penalty for which cannot be multiplied by the number of items of work done on the day of rest.

But this does not mean, that if the thief should, at a different time, steal property from the same place, he could not be punished for the new transaction, nor that because a man had been convicted for working on one Sunday he could not be convicted and punished for subsequently working on a different Sunday. For every penal statute must have relation to time and place, and corporations whose operations are conducted over a large territory, by many agents, may commit offenses at the same time in different places, or at the same place at different times.

Here the 21 cars, loaded at different periods, had been gathered into one train. As the period of lawful confinement of the cattle first loaded expired, there was a failure to unload. For that failure the statute imposed a penalty. But there was then no offense whatever as to the animals in the other 20 cars of the same train, which, up to that time, had not been confined for 28 hours.

When, however, later in the day, at the same or a different place, the time for the lawful confinement of the animals in the other 20 cars successively expired, there were similar, but distinct and separate failures then and there to unload. They were separately punishable, since the provision that "for every such failure" the company shall be liable to a penalty prevented a merger. If the period of lawful confinement of several carloads of cattle expires at the same time and place, and the company fails to unload them as required by the statute, and if these cattle all belong to one owner, it is conceded that there is only one offense. It is not different if the same cattle, at the same time and place, had belonged to various owners, or had been shipped under different consignments.

Several expressions in the statute, and particularly the provision that, in estimating the period of lawful confinement, "the time consumed in loading and unloading shall not be considered," recognize that the proper load-

ing or unloading of a number of animals may be treated as a single act, and there is nothing to indicate that it is to be treated as more than one act because the animals happen to belong to different persons. The loading of numerous cars might proceed concurrently; or if not discontinuous or unduly prolonged several cars of cattle of the same consignor might be loaded at the same time within the meaning of the act, in which event the period of their lawful confinement, on the same train, would end at the same time and place. There would in this latter case be coincidence between the one shipment and the one offense.

But in determining whether the number of penalties is always to be measured by the number of shipments on the same train, even when the animals were loaded at different times, it is to be remembered that the statute is general. It applies to the transportation of a trainload of cattle belonging to one owner; to the more usual case where animals belonging to one or more owners are loaded into different cars at different times, and also to those instances where one or a few horses or other animals are shipped and at a different time or farther on during the journey other animals are loaded into the same car. These differences in shipments do not affect the duty of the carrier to the animals, but only the time when the duty to unload is to be performed. The number of consignors, the consent of the owner or agent in charge of the particular shipment that the cattle might be confined for 36 hours, the number of bills of lading and the particulars of the shipment are immaterial, except as they serve to fix the limit of lawful confinement.

To illustrate: It appears in this record that several hundred animals belonging to one owner and consigned to one dealer were loaded into four cars at the same time. The 28 hours of their lawful confinement necessarily expired at the same time. The simultaneous failure to unload these four cars was single, and punishable as a single

offense. But the duty and offense in this transaction would not have been quadrupled if the company had issued to the owner four bills of lading instead of one. Nor would there have been any increase of duty if these same cattle had been received from four consignors instead of one.

The statute was not primarily intended for the benefit of the owners. Indeed, it is restrictive of their rights. The penalty does not go to the consignor, but to the United States for each failure to unload cattle, regardless of who may own them; and even if the owner consented to their confinement beyond a period of 36 hours. The title of the act is "to prevent cruelty to animals in transit," its declared "intent being to prohibit their continuous confinement beyond a period of 28 hours, except upon the contingencies hereinbefore stated." Regardless of the number of shipments, at any time and place where they are willfully and knowingly confined beyond the lawful period there is a violation of the statute as to the animal or animals then and there in custody for transit in interstate commerce.

The point is made in the brief that this court has no jurisdiction, because the amount involved in the cases embraced in these writs of error was only \$1,000. The court, we think properly, consolidated all the cases (Rev. Stat., § 921) and, as consolidated, the amount of the possible penalties sued for in the eleven actions was fifty-five hundred dollars. The company is liable for nine penalties, because nine times it failed to unload as required by the statute. One penalty should be imposed as to animals referred to in cases numbered 1871 and 1872, and one as to those in 1869 and 1873, where the time for the required unloading respectively coincided.

In other respects the judgment of the Circuit Court of Appeals reversing the judgment of the District Court is affirmed.